91-357

No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF LOUISIANA
Petitioner

v.

BRIAN BRUCE
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA FIRST CIRCUIT COURT OF APPEAL

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QUESTIONS PRESENTED

I. Did the court below err in holding that the due process clause of the U.S. Constitution, as interpreted by the Court in *Jackson v. Virginia*, 433 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), requires a reviewing court, which is prohibited by the State Constitution from reviewing questions of fact in criminal cases, to re-examine the credibility determinations made by the trier of fact rather than defer to those resolutions?

II. Did the court below err in holding that the due process clause of the U.S. Constitution, as interpreted by the Court in *Jackson v. Virginia*, requires the reviewing court to scrutinize the factfinder's reasoning process to determine if that process was rational, and to do so in light of the theories of innocence presented by the defense and the evidence as a whole presented by both the defense and the state, rather than by reviewing all of the evidence in the light most favorable to the State?

III. Did the court below err in reversing the conviction, on federal due process grounds, of the forty-one year old male teacher-defendant for sexually molesting his then four and one-half year old male student-victim based on its finding "the hypothesis of innocence presented by the defendant (was) sufficiently reasonable that any rational trier of fact would have a reasonable doubt as to defendant's guilt," *State v. Brian Bruce*, 577 So.2d 209, 215 (La. App. 1st Cir. 1991), despite the fact that the child witness testified as to every essential element of the crime necessary to support a conviction.

PARTIES TO THE PROCEEDINGS

Petitioner and plaintiff-appellant below is the State of Louisiana. Respondent and defendant-appellee below is Brian Bruce.

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PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA FIRST CIRCUIT COURT OF APPEAL

Petitioner, the State of Louisiana, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Louisiana First Circuit Court of Appeal, entered in the above captioned proceeding on March 5, 1991, along with the Louisiana Supreme Court's denial of writ of certiorari and denial of application for reconsideration of the writ denial dated May 24, 1991 and June 28, 1991, respectively.

The court below erred in reviewing the sufficiency of the evidence supporting respondent's criminal conviction due to its misunderstanding of the requirements of due process as enunciated by this court in *Jackson v. Virginia*, 443 U.S. 307,99 Sct. 2781, 61 LEd. 2d 560 (1979).

OPINIONS BELOW

A copy of the Louisiana Supreme Court's denial of petitioner's

Writ of Certiorari is reported at 580 So.2d 667 and is reprinted at p. 17a. A copy of the Louisiana Supreme Court's denial of petition's Motion For Reconsideration is reprinted at p. 18a.

The opinion of the First Circuit Court of Appeals for the State of Louisiana is reported at 577 So.2d 209 and is reprinted at p. 1a.

Respondent was originally convicted in a jury trial, Judge Bob H. Hester, presiding, in the Nineteenth Judicial District Court, Parish of East Baton Rouge, Case No. 9-88-984.

JURISDICTION

The respondent, Brian Bruce, was convicted of molestation of a juvenile in the Nineteenth Judicial District Court, East Baton Rouge Parish, Louisiana. He was sentenced to fifteen years imprisonment at hard labor. The sentence was suspended and defendant was placed on active supervised probation for five years, subject to general and specific conditions. His conviction and sentence were reversed on direct appeal on March 5, 1991. An application for supervisory review to the Louisiana Supreme Court was denied without written opinion on May 24, 1991. An application for reconsideration of the writ denial was denied without written opinion on June 28,1991.

The jurisdiction of this Court to review the judgment of the Louisiana Supreme Court is invoked pursuant to 28. U.S.C. §1257.

PERTINENT STATUTORY PROVISIONS

U.S. Const. amend. XIV, §1, provides:

Amendment XIV.

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

La. Const. Art. 5 §5 (1974) provides:

> **§5. Supreme Court; Jurisdiction; Rule-Making Power; Assignment of Judges**
>
> Section 5. **(A) Supervisory Jurisdiction; Rule-Making Powers; Assignment of Judges.** The supreme court has general supervisory jurisdiction over all other courts. It may establish procedural and administrative rules not in conflict with law and may assign a sitting or retired judge to any court.
>
> **(B) Original Jurisdiction.** The supreme court has exclusive original jurisdiction of disciplinary proceedings against a member of the bar.
>
> **(C) Scope of Review.** Except as otherwise provided by this constitution, the jurisdiction of the supreme court in civil cases extends to both law and facts. In criminal matters, its appellate jurisdiction extends only to questions of law.
>
> **(D) Appellate Jurisdiction.** In addition to other appeals provided by this constitution, a case shall be appealable to the supreme court if (1) a law or ordinance has been declared unconstitutional; (2) the defendant has been convicted of a felony or a fine exceeding five hundred dollars or imprisonment exceeding six months actually has been imposed.
>
> **(E) Other Criminal Cases; Review.** In all criminal cases not provided in Paragraph (D) (2) of this Section, a defendant has a right of appeal or review, as provided by law.
>
> **(F) Appellate Jurisdiction; Civil Cases; Extent.** Subject to the provisions in Paragraph (C), the supreme court has appellate jurisdiction over all issues involved in a civil action properly before it.

STATEMENT OF THE CASE

In the spring of 1987, Christopher Wilkerson's parents began sending him to the Baton Rouge Speech and Hearing Foundation

where he was given individual speech therapy, once a week, for a speech impediment. The child then attended a special summer school program at the Foundation and was subsequently enrolled in the 1987 fall semester of daily instruction at the Foundation beginning in September. During the fall semester, every morning until noon, the child attended a class taught by Charlotte Sartain Provensa, while the defendant, Brian Bruce, or "B.B.", as he was commonly called, taught another class in a classroom across the hall. Each day at 12:30, after lunch, the child went to the defendant's classroom where the defendant supervised him and several other preschool and kindergarten children who stayed at school in the afternoon until 2:00 or 2:15 p.m. Because the child's mother worked, the child's maternal grandmother transported him to and from school on a regular basis.

Christopher Wilkerson was a happy child who loved school, had a particular fondness for "B.B.", and was very close to his father and grandfather. (R. pp. 71-72, 137, 158.) In the fall of 1987, his behavior began to change. (R. pp. 158-9.) Christopher quit talking about school, was reluctant to get dressed in the morning, and even began hiding his schoolwork in his grandmother's car. (R. p. 72.) Significantly, Christopher quit talking about "B.B." although he had previously talked about him all the time. (R. pp. 71, 97, 137.) He withdrew from his father and grandfather. (R. pp. 137, 158-59.) Although he had been potty trained since age one and a half, Chris began soiling his pants. (R. pp. 138, 159.) On one occasion, he grabbed his older brother's penis as the two bathed together and tried to put it in his mouth. (R.pp. 97-98.) His parents noticed that his rectum was, unexplainably, red and irritated. (R. p.140.)

On October 6, 1987, Christopher's grandmother arrived five to ten minutes late in picking up Christopher from school. (R. pp. 154, 157.) She looked in "B.B.'s" classroom, where Chris usually was, but found no one. She solicited the aid of a teacher's assistant, Marguerite Baronne, and the two walked through the school calling for Christopher within earshot of the closet where he was ultimately found, for approximately ten minutes. (R. pp. 158, 172, 297-98, 387.) Finally, the two women returned to "B.B.'s" classroom where they observed "B.B." and Chris emerge from a closed walk-in

closet. Christopher's grandmother, Jerry Bates, grabbed the child and left. (R. pp. 157, 165-67, 172, 387.)

Ms. Bates did not appreciate the significance of this closet incident until early November, 1987. On that date, she and her daughter, Debra Wilkerson, discussed Christopher's behavioral changes and began to put two and two together. (R. p.159.) They related their concerns to the police. (R. p. 159.)

At the police officer's suggestion, Christopher's parents took Chris to see a medical doctor. On November 9, 1987, Dr. B.F. Thompson conducted a physical examination of the child. The exam was inconclusive. (R. p. 144.) Later that evening, Joseph Wilkerson, Christopher's father, discussed the matter with Christopher. Based on what Christopher told him had occurred with "B.B.", Mr. Wilkerson signed an affidavit in support of a warrant for defendant's arrest. (R. p. 140.)

Christopher was taken to see Dr. Alan Taylor, a clinical psychologist capable of rendering an opinion regarding sexual abuse of children. Dr. Taylor conducted interviews on several occasions with Christopher and also interviewed his family and concluded that in his expert opinion, Christopher Wilkerson had been sexually abused. (R. pp. 190, 203-05.) He further explained that from the information he received from Chris concerning the type of abuse involved, there would be no physical evidence. (R. p. 220.)

After Christopher's parents pulled him out of the Baton Rouge Speech and Hearing Foundation and placed him in a new school, Christopher began returning to the child he had previously been. He began sitting on his father's lap again. (R. pp.140-41.) He liked school again. (R. p. 161.) However, when Dr. Taylor consulted Chris approximately one year after the abuse, the child still exhibited extreme anger towards defendant. (R. pp. 201-03.)

At trial, Christopher, then aged six years and eight months (R. p. 69), testified in open court and in a face-to face confrontation with the defendant that he did not like Mr. B.B. because he had done something that made Christopher not like the teacher. He stated that "B.B." had touched him in the "wrong place." When asked what the "wrong place" was, Christopher touched his genitals. (R. pp. 106-07.) He further stated that the touching took place in the closet near

his classroom at school. (R. p. 107.)

Additionally, Dr. Alan Taylor, a clinical psychologist capable of rendering an opinion regarding sexual abuse of children, testified that he had interviewed Christopher Wilkerson on several occasions as well as other family members. Dr. Taylor testified to the methods used in interviewing victims of sexual abuse and to the sessions he had with Christopher and his family. Based upon the behaviors exhibited by Christopher, the sessions with Christopher, and information supplied by family members, Dr. Taylor concluded that in his expert opinion as a clinical psychologist, Christopher Wilkerson had been sexually abused. (Tr. pp. 138-40; R. pp. 203-05.)

The defendant testified that he never touched the child's genitals. In explaining the reason he was seen leaving a closed closet/storage room with the child, he claimed that the child had been hiding and at the time the grandmother and teacher's aid came upon him he was merely escorting the child from the closet. (He did not offer an explanation as to why the door had been closed just before he exited the room with the child.) Obviously rejecting his explanation, the jury believed the child and other corroborating witnesses and returned a verdict of guilty to the charge of molestation of a juvenile.

REASONS FOR GRANTING THE WRIT

I. **To correct the Louisiana Supreme Court's misinterpretation of the requirements of due process as enunciated in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), so that convictions obtained in Louisiana's trial courts are reviewed under the correct due process standards in Louisiana's appellate courts.**

II. **To require the Louisiana First Circuit Court of Appeal to reconsider this case in light of the correct due process and *Jackson v. Virginia* requirements, giving the deference to this child victim's testimony that it is entitled and viewing the evidence as a whole in the proper light.**

ARGUMENT

With the decision *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), the United States Supreme Court examined the due process clause of the Fourteenth Amendment to determine the level of proof which can constitutionally support a criminal conviction. In *Jackson*, this Court set forth the standard to be applied by federal courts in examining the sufficiency of the evidence upon which convictions obtained in state trial courts are based. Prior to the decision in *Jackson v. Virginia*, the Louisiana Supreme Court reviewed sufficiency of evidence using a no evidence test thought to have been mandated by the Louisiana constitutional proscription of review of facts in criminal cases.[1] Recognizing that appeals in criminal cases are permitted on questions of law alone, the court determined that, when the issue was sufficiency of evidence to support a conviction, a question of law was presented only when the defendant alleged a total absence of any factual support for a verdict.[2] With the adoption of the *Jackson* standard in *State v. Matthews*, 375 So.2d 1165, 1168 (La. 1979), as mandated by the federal due process clause, the Louisiana Supreme Court dramatically altered its approach to appellate review of sufficiency of evidence.[3] This new approach developed in Louisiana courts without significant consequence until the Louisiana Supreme Court rendered the decision *State v. Mussall*, 523 So.2d 1305 (La. 1988) in

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[1] La. Const. Art. V, §5(C) limits the Supreme Court's appellate jurisdiction in criminal cases "only to questions of law."

[2] *See State v. Hudson*, 373 So.2d 1294 (La. 1979), *rev'd* 450 U.S. 40 (1981); *State v. Baskin*, 301 So.2d 313 (La. 1974).

[3] This approach was codified in 1982 with the enactment of La Code Crim. P. art. 821, which established a *Jackson*-like standard for post-verdict motions of acquittal filed in the trial court based on insufficiency of evidence. *See State v. Captville*, 448 So.2d 76 at 678 (La. 1984). However, nothing therein altered the prohibition by the State Constitution that appellate courts do not evaluate the credibility of the witnesses or other factual matters. la. Const. Art. 5, §5(C) 1974; *State v. Richardson*, 425 So.2d 1228, 1232 (La. 1983).

1988,[4] which altered the *Jackson* test on reviewing the sufficiency of the evidence.[5]

In *State v. Mussall*, the Louisiana Supreme Court, for the first time since adopting the *Jackson* standard, sustained the reversal of a conviction on the ground that the trier of fact unreasonably accepted as "credible" the testimony of a certain witness.[6] The decision, on the ground that *Jackson* so requires, established the rule that the trier of fact's credibility findings are subject to review and that the reviewing court must view the evidence put on by both the state and the defense "from the perspective of a hypothetical rational trier of fact." *State v. Mussall*, 523 So.2d at 1310 (emphasis original). In that case, the Louisiana Supreme Court had originally granted certiorari "to consider the state's claim that the court of appeal did not apply the appropriate methodology in reversing the defendant's conviction but instead directly assessed the credibility of the witnesses and substituted its finding of a reasonable doubt for that of a rational trier of fact." *State v. Mussall*, 523 So.2d at 1306. Having only what it considered "the uncorroborated testimony of an eyewit-

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[4] *See, e.g., State v. Rosiere*, 488 So.2d 965, 968 (La. 1986); *State v. Captville*, 448 So.2d 676, 678 (La. 1984); *State v. Allen*, 440 So.2d 1330, 1333 (La. 1983); *State v. Dykes*, 440 So.2d 88, 93 (La. 1983); *State v. Sutton*, 436 So.2d 471, 474-475 (La. 1983); *State v. Chism*, 436 So.2d 464, 466 (La. 1983); *State v. Johnson*, 426 So.2d 95, 101 (La. 1983) (citing cases); *State v. Richardson*, 425 So.2d 1228, 1230-1231 (La. 1983); *State v. Graham*, 422 So.2d 123, 129 (La. 1982), appeal dismissed, *Graham v. Louisiana*, 461 U.S. 950, 103 S.Ct. 2419, 77 L.Ed.2d 1309 (1983); *State v. Ennis*, 414 So.2d 661, 663 (La. 1982); *State v. Moody*, 393 So.2d 1212, 1215 (La. 1981); *State v. White*, 389 So.2d 1300, 1301 (La. 1980); *State v. Morgan*, 389 So.2d 364, 366 (La. 1980); *State v. Harveston*, 389 So.2d 63, 64 (La. 1980); *State v. Hartman*, 388 So.2d 688, 694 (La. 1980).

[5] *See State v. Bruce*, 577 So.2d 209 (La. App. 1st Cir. 1991); *State v. Burger*, 541 So.2d 842 (La. 1989); *State v. Hatcher*, 568 So.2d 578 (La.4th Cir. 1990); *State v. Bay*, 529 So.2d 845 (La. 1985).

[6] The court of appeal reversed the conviction. *State v. Musall*, 514 So.2d 505 (La. App. 4th Cir. 1987). The Louisiana Supreme Court granted the state's writ on application, 515 So.2d 1101 (La. 1987), and then affirmed the reversal, 523 So.2d 1305 (1988) (on rehearing).

ness" supporting the conviction, the Louisiana Supreme Court found itself "confronted with forceful conflicting arguments that a reviewing court must, on the one hand, give deference to the trier of fact's credibility call, and, on the other, reverse if no rational trier of fact would have found guilt beyond a reasonable doubt based upon the whole record." *State v. Mussall*, 623 So.2d at 1308.

Finding "that any rational trier of fact, after viewing all of the evidence as favorably to the prosecution as a rational fact finder can (emphasis supplied), necessarily must have a reasonable doubt as to the defendant's guilt," the Louisiana Supreme Court upheld the judgment of the Court of Appeal reversing the defendant's conviction. *State v. Mussall*, 533 So.2d at 1311. In reaching this conclusion, the Louisiana Supreme Court first set forth the legal principles governing review of insufficient evidence claims as it interpreted those rules to have been established by this Honorable Court in *Jackson*.

Although this court, in *Jackson v. Virginia*, indicated that the relevant inquiry to be made by the reviewing court is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt in light of the evidence which should be viewed in the light most favorable to the prosecution, the Louisiana Supreme Court turned its focus on the "rationality" of the trier of fact's reasoning process as well as its ultimate finding. In so doing the Louisiana Supreme Court erred in several respects. First the Louisiana Supreme Court predicated its entire analysis on both the opinion and concurring opinion. Throughout *Mussall*, the Louisiana Supreme Court focuses primarily on the concurring opinion in *Jackson*, weaving citations from the concurrence with the main text, in order to find support for its manipulation of the *Jackson* rule. This inappropriate reliance on the concurrence apparently contributed to the Louisiana Supreme Court's subsequent errors.

While continuing to recite to the language of this Court's pronouncements in *Jackson*, the Louisiana Supreme Court in *Mussall*, allegedly relying on *Jackson*, fashioned its own methodology of reviewing the sufficiency of the evidence which is in direct conflict both with the Louisiana Constitution and with the precepts enunciated by this Court in *Jackson*. For example, this Court in *Jackson* declared that the critical question in reviewing the sufficiency of the

evidence is whether "after (emphasis supplied) viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson* at 2789. Furthermore, this Court explicitly stated that "[j]ust as the standard announced today does not permit a Court to make its own subjective determination of guilt or innocence, it does not require scrutiny of the reasoning process actually used by the factfinder — if known." *Jackson* at 2789 n. 13. Disregarding this language of *Jackson*, however, the *Mussall* court, although claiming to be following the mandates of *Jackson*, first stressed that the principal criterion of *Jackson* is rationality (*Mussall* at 1310) and then required scrutiny of the reasoning process actually used by the factfinder. Thus, according to the Louisiana Supreme Court, the correct application of the *Jackson* standard is that if "rational triers of fact could disagree as to the interpretation of the evidence, the rational triers' view of all of the evidence most favorable to the prosecution must be adopted." *Mussall*, 523 So.2d at 1310 (emphasis original). The discrepancy between the appropriate methodology to be employed in reviewing evidence enunciated in *Mussall* and that pronounced in *Jackson* is apparent.

Thus, under *Jackson*, if State's witness "A"'s testimony differs from defense witness "B"'s and State's witness "C"'s testimony differs from defense witness "D"'s, then "A"'s and "C"'s versions should be accepted if believed by the trier of fact and, if the testimony sufficiently establishes the elements of the crime, the conviction should be upheld. *Mussall* misreads this procedure as requiring an initial review of the entirety of the evidence since, the Louisiana Supreme Court says, a rational factfinder would examine it that way, and then, only if rational triers of fact could disagree as to the appropriate interpretation of all of the evidence, resolve the disparity in favor of the prosecution. Given the previous hypothetical, *Mussall* may demand a different outcome than that obtained through application of the *Jackson* analysis if the testimonial versions of the evidence presented by "B" and "D", as read from a cold record, appear sufficiently plausible that the reviewing court imagines it may have had a reasonable doubt about the accuracy of the testimonial versions of the evidence presented by "A" and "C".

Because the standard of reviewing the sufficiency of the evidence by the Louisiana appellate courts is derived from *Jackson*, this Court should grant the writ of certiorari to correct the misapplication of *Jackson*.

Moreover, while *Jackson* states that a reviewing court "faced with a record of historical facts that supports conflicting inferences must presume — even if it does not affirmatively appear in the record — that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer (emphasis added) to that resolution; *Jackson* at 2793, the Louisiana courts, in their misinterpretation of *Jackson*, require an additional rationality analysis of the specific conclusions reached by the trier of fact, including credibility choices.[7] Thus, those facts and resolutions which this Court states must be deferred to by the reviewing court, the Louisiana courts, although claiming to be following *Jackson*,[8] require an analysis to determine both whether the factfinder was rational in reaching those conclusions concerning the "ultimate facts" as well as making those credibility choices. Because of this misinterpretation (and/or disregard) of *Jackson*, appellate courts in Louisiana are usurping the fundamental role of the jury in the name of *Jackson*.

The Louisiana Supreme Court's enunciation in *Mussall* of its misunderstanding of the *Jackson* standard has led to confusion and inconsistent consideration of insufficient evidence claims in Louisiana's appellate courts. Courts of Appeal in every circuit of the Louisiana system have relied upon *Mussall* in support of both their affirmations and reversals of lower courts' adjudications of guilt. *Mussall* has been cited for its characterization that the principal criterion of a *Jackson* review is rationality,[9] its assertion that the

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[7] *Mussall* at 1309-11; *Bruce* at 577 So.2d at 215-16.]

[8] That the authority for this required analysis is *Jackson* is apparent both becaue of the direct reference to *Jackson* and because the Louisiana Constitution prohibits such credibility evaluations. Art. 585(C) & *Richardson*, *infra*. Thus, there is no state basis for this perceived standard.

[9] *See, e.g., State v. Meredith*, 536 so.2d 555 (La. App. 1st Cir. 1988).

proper perspective from which to examine the evidence is through the eyes of the hypothetical rational trier of fact,[10] its articulation of the proper methodology for reviewing the record evidence,[11] and its approval of the second-guessing of credibility evaluations.[12] The prosecution of criminal cases in which only the victim and defendant are present, such as molestation or rape cases, and which, therefore, turn largely on credibility evaluations, has been particularly hampered by this misconstruction.[13] Indeed, if appellate courts are being required and encouraged to reassess on the basis of a cold record the credibility choices made by the factfinder, these hard fought convictions are most assuredly in jeopardy, as evidenced by the instant case.

The case upon which this application for writ of certiorari is based, *State v. Brian Bruce*, is a prime example of the type of havoc which Louisiana's misinterpretation of *Jackson* is wreaking on convictions which depend largely on credibility evaluations. Particularly in child witness cases involving sexual abuse where the ultimate question is often who the jury believes, the resolution of credibility is solely within the province of the jury, and nothing in *Jackson* mandated change in that regard. In evaluating the evidence supporting defendant Brian Bruce's conviction for molestation of a juvenile, the Louisiana First Circuit Court of Appeal held:

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[10] *See e.g. State v. Meredith, supra; State v. Cashen 544 So 2d 1268 (La. App. 4th Cir. 1989).*

[11] *See, e.g., State v. Fuqua*, 558 So.2d 740 (La. App. 3d Cir. 1990); *State v. Meredith, supra.*

[12] *See, e.g., State v. Brian Bruce, supra, See, e.g., State v. Hatcher*,568 So.2d 578 (La. App. 4th Cir. 1990); *State v. Burger*, 531 so.2d 1163 (La. App. 4th Cir. 1988); *writ granted*, 541 So.2d 842 (La. 1989) *and remanded for consideration in light of State v. Mussall*, 523 So.2d 1305 (La. 1988); *on remand*, 550 So.2d 1282, *writ denied*, 556 So.2d 1276 (La. 1990) (two justices would grant the writ).

[13] *See, e.g., State v. Brian Bruce, supra; State v. Powell*, 438 So.2d 1306 (La. App 3d Cir. 1983).

> [T]he remaining evidence boils down to the October 6, 1987 closet incident and the child's testimony at trial. with regard to the closet incident, we find the hypothesis of innocence presented by the defendant sufficiently reasonable that any rational trier of fact would have had a reasonable doubt as to defendant's guilt . . . Therefore, the prosecution's case hinges on the testimony of the child. Simply because the child's testimony tends to support each fact necessary to constitute the crime charged, we may not disregard our duty under due process of law as interpreted by *Jackson v. Virginia*. *State v. Mussall*, 523 So.2d at 1311.

(*State v. Brian Bruce*, at 215-216) (emphasis added; footnote omitted). The court then reviewed the child's testimony in a light blatantly favorable to the defendant, focusing on the child's young age and prior reluctance to openly offer details of the crime and ultimately concluded that "the decision of the jury to convict this defendant based on the evidence presented [was] irrational and unsupported." (*State v. Brian Bruce*, at 216.)

That the Louisiana appellate courts are disregarding the legal conclusion announced in *Jackson* that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution is highlighted by the acknowledgement in *Bruce* that "the child's testimony tend[ed] to support each fact necessary to constitute the crime charged." (Emphasis added.) *Bruce*, 577 So.2d at 216. Despite this concession to the record testimony, the *Bruce* court, explicitly relying on *Jackson*, reversed the conviction.

However, had the *Bruce* court correctly applied the *Jackson* standard as opposed to the distorted standard of review now being utilized in Louisiana under the guise of *Jackson*, the conviction certainly would have been affirmed. The child victim in *Bruce* testified that while alone in the closet his teacher, the defendant, touched him on his genitals. In direct contradiction, the defendant testified that he never touched the child on his genitals and explained his presence in the closet with the child as a consequence of the child hiding. Having observed the demeanor of both the victim and the defendant, the jury returned a verdict of guilty, obviously resolving the credibility choices in favor of the testimony of the

victim and other corroborating state witnesses. Under *Jackson*, the viewing court must defer to those resolutions of conflicting testimony, and then, taking those facts, must determine if any rational trier of fact could have found the essential elements beyond a reasonable doubt. What Louisiana appellate courts are now doing in the name of *Jackson*[14], as evidenced by the instant case, is first assessing whether the evidence in the light most favorable to the State is rational, thereby requiring scrutiny of the reasoning process, an analysis the *Jackson* court explicitly stated was not required.[15] By requiring this extra layer of analysis Louisiana courts are in effect promoting, and indeed mandating, the reviewing court to "second-guess," from a cold record, the credibility choices as well as other resolutions of factual conflicts made by the trier of fact. Such evisceration of the role of the jury is abhorrent to the fundamental principles of the Louisiana Constitution's system of appellate review, and is certainly not mandated by the teachings of *Jackson*. To end this impermissible usurpation of the factfinder's historical function, in the sole name of this court's decision in *Jackson*, the State of Louisiana implores this Court to grant this writ of certiorari to correct the injustices now being perpetrated by the courts in Louisiana under the mistaken belief that *Jackson* so requires.

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[14] As noted earlier, the only basis for the court's review/analysis is *Jackson*, since state law prohibits the review of questions of fact in criminal cases.

[15] *Jackson* at 2785 n. 13.

CONCLUSION

For the foregoing reasons, this Court should grant the writ requested.

Respectfully submitted,

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APPENDIX

STATE of Louisiana
v.
Brian BRUCE.
No. KA 90 0562.
Court of Appeal of Louisiana,
First Circuit.
March 5, 1991.

Bryan Bush, Dist. Atty., by Jessie Bankston, Asst. Dist. Atty., Office of Dist. Atty., Baton Rouge, for plaintiff, appellee.

Robert Klenipeter, Baton Rouge, for defendant, appellant.

Before EDWARDS, WATKINS and LeBLANC, JJ.

EDWARDS, Judge.

Defendant, Brian Bruce, was charged in a two-count indictment with the commission of molestation of a juvenile over whom he had control or supervision against a four-year-old boy (count 1) and against a five-year-old boy (count 2), violations of LSA-R.S. 14:81.2. Defendant was tried by a jury which convicted him as charged on count 1 and acquitted him on count 2. The trial court sentenced him to imprisonment at hard labor for a term of fifteen years. The sentence was suspended and defendant was placed on active supervised probation for five years, subject to general and specific conditions. Defendant's motion for post verdict judgment of acquittal and/or new trial was denied. Defendant now appeals his conviction on count one.

FACTS

The testimony elicited at trial reflects the following sequence of events:

In the spring of 1987, the victim's parents began sending him to the Baton Rouge Speech and Hearing Foundation where he was given individual speech therapy, once a week, for a speech impediment. The child then attended a special summer school program at

the Foundation and was subsequently enrolled in the 1987 fall semester of daily instruction at the Foundation in September. During the fall semester, every morning until noon, the child attended a class taught by Charlotte Sartain Provensa, while the defendant taught another class in a classroom across the hall. Each day at 12:30, after lunch, the child went to the defendant's classroom where the defendant supervised him and the other preschool and kindergarten children who stayed at school in the afternoon until 2:00 or 2:15 p.m. Because the child's mother worked, the child's maternal grandmother transported him to and from school on a regular basis.

The child's parents and grandmother testified that in September, 1987, the child began to display certain behavorial changes which caused them concern. Specifically, they recounted that the child initially loved school and frequently came home with papers to show and stories to tell. Suddenly, the child began to display an unusual dislike for school, an unwillingness to get out of bed in the mornings, and a reluctance to talk with them about school. The child, who had been toilet trained, also began soiling his pants.

The child's ten-year-old brother testified that he and the child had frequently bathed together and that one day, the child grabbed his penis, and tried to put it in his mouth. The brother informed his mother of the child's behavior, and she instructed the two to stop bathing together.

One day, on or about October 6, 1987, the child's grandmother was about five or ten minutes late in arriving at the Foundation to pick up the child after school. When she arrived at the school, she went to defendant's classroom where she ordinarily picked up the child. Finding on one in the classroom, she went outside to look for him in the playground. She reentered the school building and encountered Marguerite "Boots", a teacher's aide, who helped her look for the child. They went back to defendant's classroom, calling out the child's name. Once they were inside the classroom, a door to the supply closet, located adjacent to the classroom, opened and the defendant and the child exited the closet. The grandmother

testified that she and the child then left the school.

In early November, the child's mother and the grandmother conferred with one another about the various behavioral changes in the child. The grandmother related the October 6 closet incident to the mother, and together they concluded that there was "something going on." They next talked to a friend who was affiliated with the police, and on approximately November 9, 1987, they reported the matter to the police. The victim's father testified that he first learned of the incident when his wife and her mother telephoned him from the police station and informed him of their actions. He later had a conversation with the child, after which he went to the police station and signed a sworn affidavit for defendant's arrest.

At the recommendation of the police, the child was examined by a doctor. The examination, performed by Dr. B.F. Thompson, failed to show any evidence that the child had been sexually abused.

The child's parents then removed him from school at the Foundation and placed him in another school.

The parents testified that they took the child to the District Attorney's office on several occasions. On these occasions, the child would be taken into a separate room with a District Attorney office representative. No one else was present at these meetings, and there was no testimony at the trial regarding the content of these sessions.

At the recommendation of the District Attorney's office, the parents took the child to a clinical psychologist, Dr. Allen Taylor. Dr. Taylor conducted an initial series of six sessions with the child on February 1, 3, 17, and 23, 1988, and March 9 and 17, 1988. . Taylor testified that the child was extremely reluctant to talk, and shook his head vigorously in response to questions or statements regarding the alleged abuse. In order to aid the child's communication, . Taylor employed the use of anatomically correct dolls. He testified that the use of these dolls to determine the occurrence of sexual abuse in children is highly controversial, however, he uti-

lized them when working with developmentally handicapped children. He used them in this case based on the child's unwillingness to communicate and in light of the child's speech and language delay. Dr. Taylor concluded these sessions in March since he felt it unlikely that the child would be or could be cooperative with further prodding and that the child had given all the information that he was capable of giving at the time.

Approximately eight months later,[16] Dr. Taylor saw the child again. This time, Dr.Taylor noted that the child was much more verbal and much more interested in and able to communicate. The child did continue to display some reluctance to talk; the reluctance was "much more confined to the doll play and the accounts of what had happened." He again employed the use of the anatomically correct dolls in his sessions with the child. Dr. Taylor testified that, based upon his observations of the child engaged in doll play and of the child's accompanying verbalizations, in his expert opinion, the child had been abused.

Approximately nine months after the second set of sessions with Dr. Taylor, the trial in the matter was held. The child testified at trial as follows:

Q. Do you remember a man named Mr. B.B.?[17]

A. Yes, Sir.

Q. And how do you know Mr. B.B.?

A. Where I go to school.

---

[16] Dr. Taylor testified that he did not see the family again until about four or five months later. However, our review of the record indicates that at least an eight-month period had elapsed.

[17] The record reflects that defendant, Brian Bruce, was generally also known and referred to by the students, parents, and teachers at the Foundation as "B.B." or "Mr. B.B."

Q. Where you go to school?

A. Yes, Ma'am.

Q. Do you like Mr. B.B.?

A. No.

Q. No.

Mr. Kleinpeter: I object now, may it please the court. I haven't heard the child say anything.

The court: He nodded his head.

By Ms. Bernie.

Q. Can you answer that question with a word?

A. Yes.

Q. Do you like Mr. B.B.?

A. No, Ma'am.

Q. Did he do something that made you not like him?

A. Yes.

Q. Did you answer with a word?

A. Yes, Ma'am.

Q. Can you tell us what Mr. B.B. did that made you not like him? Did he dosomething to you?

A. Yes, sir.

Q. Did he touch you?

A. Yes.

Q. Can you tell us where he touched you?

A. Wrong place.

Q. Can you show us where that wrong place is?

Ms. Bernie: I would like the record to reflect the witness touched his genitals.

By Ms. Bernie.

Q. Did you want him to do that?

A. No.

Q. And what did you do when he did that?

A. Nothing.

Q. Nothing. Where were you when he did that?

A. In the closet.

Q. In the closet. Where was the closet?

A. By the bathroom.

Q. Was that near your classroom at school?

A. Yes, Sir.

Q. Did Mr. B.B. make you do anything to him?

A. No.

Q. Did he try?

A. No, Ma'am.

Mr. Kleinpeter: I object. This child is-he said he did not make him do anything.

The court: Sustained.

By Ms. Bernie.

Q. Did Mr. B. B. ever hurt you any other way?

A. No.

Q. [Child], are you telling us the truth?

A. Yes.

The defendant also testified at trial. He began working at the Foundation in 1973 and worked there continuously up to the time of his arrest in November, 1988. He denied ever having touched or made an improper move toward any child at the Foundation, particularly the two children specified in the charges. He particularly denied ever having attempted to sexually abuse any child. When questioned about the October 6, 1987, closet incident, his testimony was as follows:

A. Yes, I remember that.

Q. What happened on that date?

A. Well, as far as I remember it was a fairly normal day. There were about five or six children in the class. At 2:15 when it was time for the parents to come, I asked one of the children to open the door and when the parents came in, I gave some of them,—I matched the children to the right parents and then there were two or three—I guess two children that went across the hall to day care

because their parents worked. I took them across the hall. When I came back—

Q. Let's stop there. You had a day care for people who worked and could not come at 2:15?

A. Yes.

Q. You took two children over there?

A. Yes, Sir, I did. And then I came right back and [child's] grandmother who was not there—and [child]—I had left him in the room just as I walked across the hall. When I came back he was gone. I was concerned because you know when you lose a child in a school, you become concerned about what could happen to them.

Q. Did you have problem [sic] with him hiding?

A. Yes, Sir, I have. That was one of the games he played.

Q. What did you?

A. When I saw he was not in the classroom, I looked everywhere I could in the classroom. I did not see him under the desks or the chairs. I went down the hall away from the office to—the offices which are a number of rooms—

Q. Is that the exit toward the street?

A. There is another exit away from the regular exit, but there is another exit the other way, and I was concerned he might go out that exit.

Q. Had you thought of looking in the bathroom or the closet prior to that time?

A. No, Sir, I had not.

Q. Were you more concerned about him getting out of the building?

A. Yes, certainly. I went down that hall and checked every one of those rooms. And when I did not find him, I came back to the classroom and I checked the other classrooms too, and when I came back to the classroom where he started, and when I did not see him again, I looked in the bathroom and then I noticed a door to the closet was closed and I opened it up and there he was.

Q. What did he do? Did he come out?

A. No. He was kind of playing. So, I just asked him, I said, let's go, (child).

Q. Did he come?

A. Yes, he did.

Glynda Barnes, the Director of the Foundation at the time of the incident, testified at trial. She testified that the Foundation had an open-door policy whereby parents and teachers were able and encouraged to observe the classroom settings and their teachers at any time. Each classroom had one wall which was a one-way mirror, and usually an open window on the opposite wall. She had no first-hand knowledge about the October 6 closet incident; however, she stated that she was very much aware of this particular child's propensity for hiding, as the other teachers had talked about having to look for him on occasion because he liked to hide for fun.

Charlotte Provensa, a teacher at the Foundation, testified that "it was not unusual at all for (the child and two other children) to go run and hide in the closet. It happened frequently." Typically, she said it was this particular child (the alleged victim) who went into the closet.

Elizabeth Welch, a teacher and speech therapist at the Founda-

tion, testified that she taught in the classroom directly across from the defendant. She stated that she had open accessibility to the same closet, and that she was frequently in and out of the closet on a daily basis getting supplies.

Marguerite , the teacher's aide who helped the child's grandmother look for him on the afternoon of October 6, 1987, testified that she and the grandmother went into the defendant's classroom to look for the child and that, once she stepped into the classroom, she observed the defendant with the child, standing in the hallway right outside the storage closet. She testified that the child was fully clothed and she saw nothing alarming, out of the ordinary, or unusual about the situation.

Several other witnesses, including teachers and parents of students at the Foundation, testified regarding the good character and reputation of the defendant.

At trial, the defendant elicited the testimony of two clinical psychologists, William Owen Scott and Mary Lou Kelly, who performed a joint evaluation of Dr. Taylor's report. They testified that they found significant problems with Taylor's report. Primarily, they objected to his reliance on the use of the anatomically correct dolls in reaching his conclusion that the child had been abused, when it is "very clear and widely accepted that dolls should not be used to draw conclusions about whether or not a child was sexually abused." Their own findings regarding whether sexual abuse had occurred or whether this defendant abused the child were inconclusive; they had not themselves examined the child and their findings were not restricted to their review of Dr. Taylor's report.

All three psychologists, Drs. Taylor, Scott, and Kelly, testified that the behavioral changes in the child (sudden dislike for school, soiling his pants, etc.), while consistent with sexual abuse, are likewise indicative of other, unrelated psychological problems, and that the exact cause of such changes was indeterminable.

COMPETENCY OF THE CHILD

[1] Defendant first argues that the trial court erred in ruling that the child was competent to testify. A review of the record reveals that defendant failed to enter a contemporaneous objection to the child's competency as required by LSA-C. Cr.P. art. 841. Therefore, this assignment of error has no merit.

SUFFICIENCY OF THE EVIDENCE

Defendant next asserts that the evidence was insufficient to support a conviction on the crime charged in count 1.

[2,3] In reviewing the sufficiency of the evidence, we are controlled by the standard enunciated by the Supreme Court of the United States in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), now codified in LSA-C.Cr.P. art. 821. Under that standard, the evidence, viewed in the light most favorable to the prosecution, must be sufficient to convince a rational trier of fact that all of the elements of the crime have been proved beyond a reasonable doubt. *State v. Jacobs*, 504 So.2d 817 (La. 1987). The explicit right of a person accused of a crime to be presumed innocent until proven guilty provides an additional guarantee against criminal conviction based on inadequate evidence. La. Const., Art. 1, § 16; *State v. Mussall*, 523 So.2d 1305 (La. 1988).

The elements of the crime of molestation of a juvenile are set out in LSA-R.S. 14:81.2, which provides in pertinent part:

A. Molestation of a juvenile is the commission by anyone over the age of seventeen of any lewd or lascivious act upon the person or in the presence of any child under the age of seventeen, where there is an age difference of greater than two years between two persons, with the intention of arousing or gratifying the sexual desires of either person, by the use of ... influence by virtue of a position of control or supervision over the juvenile.

When circumstantial evidence is used in proving the commis-

sion of an offense, the evidentiary standard of LSA-R.S. 15:438 forms part of the broader inquiry in assessing the sufficiency of the evidence under the *Jackson* standard of appellate review. LSA-R.S. 15:438 states: "assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence." This is not a purely separate test from the *Jackson* sufficiency standard to be applied instead of a sufficiency of the evidence test.... Ultimately all evidence, both direct and circumstantial, must be sufficient under *Jackson* to satisfy a rational juror that the defendant is guilty beyond a reasonable doubt. *State v. Rosiere*,488 So.2d 965 (La.1986).

In evaluating the sufficiency of the evidence to convict this defendant, we are guided by the conclusions reached by our Supreme Court in *State v. Mussall*, 523 So.2d 1305 (La.1988), regarding the application of the *Jackson* standard. In *Mussall*, the Louisiana Supreme Court stated:

The principal criterion of a *Jackson v. Virginia* review is *rationally*. This is because under Winship and Jackson Fourteenth Amendment due process demands that in state trials, as has been demanded traditionally in federal trials, a criminal conviction cannot constitutionally stand if it is based on a record from which no *rational* trier of fact could find guilt beyond a reasonable doubt. Accordingly, under the Jackson methodology a reviewing court is required to view the evidence from the perspective of a hypothetical *rational* trier of fact in determining whether such an unconstitutional conviction has occurred. In reviewing the evidence, the whole record must be considered because a *rational* trier of fact would consider all of the evidence, and the actual trier of fact is presumed to have acted *rationally* until it appears otherwise. If *rational* triers of fact could disagree as to the interpretation of the evidence, the *rational* trier's view of all of the evidence most favorable to the prosecution must be adopted. Thus, *irrational* decisions to convict will be overturned, *rational* decisions to convict will be upheld, and the actual fact finder's discretion will be impinged upon only to the extent necessary to guarantee the fundamental protection of due process of law.

The Jackson doctrine or methodology is a compromise between the one extreme that maximizes the protection against the risk that innocent persons will be erroneously convicted by appellate replication of criminal trials and the other extreme that places the greatest faith in the ability of the triers of facts to produce just verdicts. Not only did the Supreme Court abjure any requirement that a reviewing court retry the issue of guilt, but it also rejected all forms of limited review under which a partial or one-dimensional view of the evidence is accepted as an index of its actual probative value. The Jackson doctrine does not permit the reviewing court to view just the evidence most favorable to the prosecution and then to decide whether that evidence convinced it beyond a reasonable doubt. Nor does it require a court to decide whether, based on the entire record, the *average* rational trier of fact could be convinced of guilt beyond a reasonable doubt. And of course, the high court abrogated the "no evidence" rule of *Thompson v. Louisville*, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960) because "it could not seriously be argued that...a modicum of evidence could by itself rationally support a conviction beyond a reasonable doubt." [emphasis in original; footnotes omitted]

State v. Mussall, 523 So2d at 1310.

This interpretation of the *Jackson* standard has influenced our courts since *State v. Mussall*, supra. See *State v. Lubrano*, 563 So.2d 847, 850 (La.1990); *State v. Burger*,541 So.2d 842 (La. 1989) (writ granted and remanded to Court of Appeal for reconsideration in light of *State v. Mussall*), 550 So.2d 1282 (La.App. 4th Cir. 1989), *cert. denied*, 556 So.2d 1276 (La.1990); *State v. Bay*, 529 So.2d 845, 851 (La.1988); *State v. Daigrepont*, 560 So.2d 959 (La.App. 3d Cir.), *cert. denied*, 566 So.2d 396 (La. 1990); *State v. Fuqua*, 558 So.2d 740, 742 (La. App. 3d Cir.), *cert. denied*, 565 So.2d 442 (La. 1990); *State v. Toups*, 546 So.2d 549 (La.App. 1st Cir.1989); *State v. Barrett*, 544 So.2d 654, 659 (La.App. 3d Cir.), *cert. denied*,551 So.2d 1336 (La.1989); *State v. Cashen*, 544So.2d 1268, 1275 (La. App. 4th Cir. 1989); *State v. Thomas*, 538 So.2d 1021 (La.App. 3d Cir.1988); *State v. Meredith*, 536 So.2d555 (La.App. 1st Cir.1988), *cert. denied*, 544 So.2d396 (La.1989).

After a thorough review of the record in the present case, we find that the prosecution established the following elements of the crime charged by direct evidence: (1) that the defendant was 41 years old; (2) that the child was four years old; and (3) that the defendant had a position of control or supervision over the child. We now evaluate the remaining evidence, in the light most favorable to the prosecution, to determine whether it is sufficient to convince a rational trier of fact that the defendant, Bruce, committed a lewd or lascivious act upon the four-year-old child, with the intention of arousing or gratifying the sexual desires of either person.

[4] The remaining evidence boils down to the October 6, 1987, closet incident and the child's testimony at trial.[18] With regard to the closet incident, we find the hypothesis of innocence presented by the defendant sufficiently reasonable that any rational trier of fact would have a reasonable doubt as to defendant's guilt. According to the defendant, the child was hiding in the closet. He had just found the child and they were both exiting the closet when the child's grandmother and the teacher's aide, Marguerite , entered the classroom.

The defendant's explanation regarding the incident on October 6, 1987, was supported by the testimony of the director of the Foundation, Glynda Barnes, and by another teacher at the Foundation, Charlotte Provensa, who both testified that the child had a propensity for hiding and particularly liked to hide in that closet. There is no evidence in the record to contradict defendant's explanation that he first went to the exits leading outside to look for the child before he checked the closet; in fact, the child's grandmother admitted that it was possible that the defendant was looking for the child at the same time that she was.

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[18] The record also contains the testimony of three clinical psychologists, however, as discussed earlier, their testimony was wholly inconclusive as to whether sexual abuse had in fact occurred.

Marguerite testified that she did not notice anything unusual or alarming when the child and the defendant exited the closet. The child's grandmother testified that the child was fully clothed and was not crying or acting unusual after he came out of the closet. The circumstantial evidence of the closet incident presented by the prosecution fails to exclude the very reasonable explanation that the child was hiding and that the defendant found him in the closet and brought him out into the classroom.

Therefore, the prosecution's case hinges on the testimony of the child. Simply because the child's testimony tends to support each fact necessary to constitute the crime charged, we may not disregard our duty under due process of law as interpreted by *Jackson v. Mussall*, 523 So.2d at 1311.

The child was four years old at the time of the alleged abuse. Criminal proceedings were instigated against the defendant by the child's mother and grandmother who reported their suspicions to a friend affiliated with the police department. Following the defendant's arrest, the child was confronted and questioned about the alleged abuse to which he first responded by shaking his head vigorously and emphatically and repeatedly said nothing. Some eight or nine months later, when questioned again, he was still reluctant verbally to recount information regarding the alleged abuse. During the two years that elapsed prior to trial, he was counseled, in private, by members of the District Attorney's office. The child's mother testified that at least two of these visits to the District Attorney's office occurred during the weeks prior to the trial. By the time of the trial, the child was six years old. His testimony consisted of one-word (i.e., yes, no) answers to very specific leading questions. Essentially, the only incriminating testimony elicited from the child at trial was that the defendant touched the child in the "wrong place," to which the child designated, by gesturing to his genitals.

Given this record, we conclude that any rational trier of fact, viewing the evidence as favorably to the prosecution as a rational fact finder can, *must* have a reasonable doubt as to the defendant's

guilt. We find the decision of the jury to convict this defendant based on the evidence presented irrational and unsupported, and, accordingly, we reverse.

REVERSED.

STATE OF LOUISIANA

v.

BRIAN BRUCE

No. 91-K-0781.
Supreme Court of Louisiana

May 24, 1991.

In re State of Louisiana:—Plaintiff(s); applying for writ of certiorari and/or review; to the Court of Appeal, First Circuit, No. KA90 0562; Parish of East Baton Rouge, 19th Judicial District Court, Div. "C", No. 9-88-984.

Prior report: La.App., 577 So.2d 209.

Writ denied.

STATE OF LOUISIANA

v.

BRIAN BRUCE

No. 91-K-0781.
Supreme Court of Louisiana

June 28, 1991.

In re State of Louisiana applying for Reconsideration of Writ denied May 24, 1991 from the Court of Appeal, First Circuit No. KA90 0562; Parish of East Baton Rouge 19th Judicial District Court Div "C" Number 9-88-984.

June 28, 1991.
Reconsideration denied.

No. 91-357

In The

Supreme Court of the United States

October Term, 1991

STATE OF LOUISIANA,

Petitioner,

vs.

BRIAN BRUCE,

Respondent.

On Petition for Writ of Certiorari to the Louisiana Court of Appeal for the First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Does the petition filed by the State of Louisiana, and the questions presented involve a substantial federal question?

2. Does the petition filed by the State of Louisiana specify or set forth any basis to invoke the jurisdiction of this Court?

3. If a federal question is arguably presented, does the petition specify the stage in the proceedings at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the courts?

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No. 91-357

In The

Supreme Court of the United States

October Term, 1991

STATE OF LOUISIANA,

Petitioner,

vs.

BRIAN BRUCE,

Respondent.

On Petition for Writ of Certiorari to the Louisiana Court of Appeal, First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The petition presents no substantial federal question; fails to comply with Supreme Court Rule 14(1)(f): if a federal question is arguably presented, it was not raised in the court below; and petitioner has failed to establish any basis to invoke the jurisdiction of this Court. Accordingly, respondent, Brian Bruce, respectfully requests that the Court deny the petition for writ of certiorari to review the decision of the Court of Appeal, First Circuit, State of Louisiana.

OPINIONS BELOW

Respondent was convicted in a trial by jury, Honorable Bob H. Hester, Judge Presiding, on one of two counts of molestation of a juvenile, Docket Number 9-808-984, Nineteenth Judicial District Court, Parish of East Baton Rouge, State of Louisiana.

Respondent filed a motion for post verdict judgment of acquittal pursuant to Article 821, Louisiana Code of Criminal Procedure, in an effort to set aside the conviction and preserve respondent's right to have the sufficiency of evidence, or the lack thereof, reviewed on appeal. The trial court denied respondent's motion and an appeal was entered, as a matter of law, to the Court of Appeal, First Circuit, State of Louisiana, with the case briefed and argued by both sides.

The Court of Appeal, First Circuit, reversed the conviction, the opinion being dated March 5, 1991. A copy of the opinion is attached to petitioner's brief, p. 1a, and is reported at 577 So. 2d 209 (La. App. 1st Cir. 1991).

Petitioner presented a petition and supporting brief to the Supreme Court of Louisiana, seeking a writ of certiorari to review the decision of the Court of Appeal, First Circuit. A copy of petitioner's petition and brief is reprinted at page 5a, *infra*.

On May 24, 1991, the Supreme Court of Louisiana, unanimously denied a writ, a full copy being reprinted at page 3a, *infra*, and is reported at 580 So. 2d 667 (La. 1991).

Petitioner filed a motion for reconsideration, reprinted at page 28a, *infra*, and the Supreme Court of Louisiana unanimously denied the same on June 28, 1991, a full copy of the denial being reprinted at page 1a, *infra*.

STATEMENT OF JURISDICTION

Petitioner attempts to invoke jurisdiction under the provisions of 28 U.S.C. § 1257, which provides:

> Section 1257. State Courts; certiorari
>
> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.
>
> (b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

However, petitioner seeks a review of a judgment of a state court without specifying the stage in the proceedings at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by the lower courts. Supreme Court Rule 14(1)(h).

Petitioner fails, and cannot do so, to establish any standing under Amendment XIV, Section 1, of the United States Constitution, inasmuch as the State of Louisiana, in the instant case, did not make or enforce any law which abridged the privileges

or immunities of any citizen of the United States nor has *any person* been denied life, liberty, property or equal protection of the laws.

Petitioner further relies on the provisions of Louisiana Constitution, Article V, Section 5 (1974) and makes specific reference to the "Scope of Review" emphasizing that appellate jurisdiction of the Supreme Court, in criminal cases, "extends only to questions of law." The decision petitioner complains of was rendered by the Court of Appeal, First Circuit, and it is regulated by the provisions of the Louisiana Constitution, Article V, Section 10 (1974), and its appellate jurisdiction, in criminal cases, is limited to questions of law.[1] Irregardless, in Louisiana,

---

1. Louisiana Constitution, Article V, Section 10 (1974) reads:

> Section 10. (A) Jurisdiction. Except as otherwise provided by this constitution, a court of appeal has appellate jurisdiction of (1) all civil matters, including direct review of administrative agency determinations in worker's compensation matters as heretofore or hereafter provided by law, (2) all matters appealed from family and juvenile courts, and (3) all criminal cases triable by a jury, except as provided in Section 5, Paragraph (D)(2) of this Article. It has supervisory jurisdiction over cases which arise within its circuit.
>
> (B) Scope of Review. Except as limited to questions of law by this constitution, or as provided by law in the review of administrative agency determinations, appellate jurisdiction of a court of appeal extends to law and facts. In the review of an administrative agency determination in a worker's compensation matter, a court of appeal may render judgment as provided by law, or, in the interest of justice, remand the matter to the administrative agency for further proceedings. In criminal cases its appellate jurisdiction extends only to questions of law.

(Cont'd)

the question of sufficiency of evidence, when properly raised, constitutes a question of law, and permits a review of the facts. *State v. Moran*, 400 So. 2d 1359 (La. 1981).[2]

Simply stated, petitioner, other than reciting the history of the case, cites 28 U.S.C. § 1257 as a basis for jurisdiction without complying with the Supreme Court Rules; without any standing; and, without a federal question and particularly any question which was presented to the lower court.

STATUTORY PROVISIONS

Louisiana Code of Criminal Procedure, Article 821[3] provides:

(Cont'd)

> (C) Other Criminal Matters. In all criminal cases not provided for in Paragraph (D)(2) or Paragraph (E) of Section 5 or Paragraph (A)(3) of this Section, a defendant has a right of appeal or review, as provided by law.

2. An observation of the Supreme Court of Louisiana in *State v. Moran*, footnote 4, is pertinent, as follows:

> 4. Prior to the decision in *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) sufficiency of evidence was frequently considered to be an issue of fact and therefore not reviewable by this Court in a criminal case. See, for example, *State v. Austin*, 374 So. 2d 1252 (La. 1979). However, sufficiency of evidence is now recognized as an issue of law and subject to review in a criminal case under the *Jackson* standard. See, for example, *State v. Byrd*, 385 So. 2d 248 (La. 1980).

400 So. 2d 1359, 1363.

3. The Comments of the Redactors, although not a part of the statute, by law, are interesting and pertinent:

(Cont'd)

Art. 821. Motion for post verdict judgment of acquittal

(Cont'd)

Since the abolition of the directed verdict in jury cases, the Supreme Court has recognized its authority to reverse convictions and dismiss the charges if the evidence does not support the conviction. See *State v. Allien*, 366 So. 2d 1308 (La. 1978); *State v. Thompson*, 366 So. 2d 1291 (La. 1978). See also *Hudson v. Louisiana*, 450 U.S. 40, 101 S. Ct. 970 (1981).

The test on appeal to determine the "sufficiency" of evidence is no longer the "total lack of evidence" test. The test now is whether a reasonable fact finder must have a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781 (1979); *State v. Byrd*, 385 So. 2d 248 (La. 1980). The test incorporated as the standard for judgments of acquittal defers to the jury's finding by requiring that the evidence be viewed in a light most favorable to the state. However, if the evidence is legally insufficient the verdict must be set aside and either a modified verdict or a judgment of acquittal must be entered. *State v. Byrd*, supra; *Hudson v. Louisiana*, supra.

The trial court or appellate court may modify the jury's verdict if the verdict is not supported by the evidence but a lesser included responsive verdict would be supported. See *State v. Byrd*, supra; *State v. Harveston*, 389 So. 2d 63 (La. 1980).

The district attorney may seek review of a post verdict judgment of acquittal or a judgment modifying a verdict. Such review does not violate double jeopardy because if the appellate court merely reinstates the jury's verdict no new trial is necessary. See *United States v. Scott*, 437 U.S. 82, 98 S. Ct. 2187 (1978); *United States v. Boyd*, 566 F.2d 929 (5th Cir. 1978).

The appropriate appellate court and mode of seeking review are, of course, determined by reference to La. Const. Art. 5 Sections 5 and 10 (1974).

A. The defendant may move for a post verdict judgment of acquittal following the verdict. A motion for a post verdict judgment of acquittal must be made and disposed of before sentence.

B. A post verdict judgment of acquittal shall be granted only if the court finds that the evidence, viewed in a light most favorable to the state, does not reasonably permit a finding of guilty.

C. If the court finds that the evidence, viewed in a light most favorable to the state, supports only a conviction of a lesser included responsive offense, the court, in lieu of granting a post verdict judgment of acquittal, may modify the verdict and render a judgment of conviction on the lesser included responsive offense.

D. If a post verdict judgment of acquittal is granted or if a verdict is modified, the state may seek review by invoking the supervisory jurisdiction of or by appealing to the appropriate appellate court.

E. If the appellate court finds that the evidence, viewed in a light most favorable to the state, supports only a conviction of a lesser included responsive offense, the court, in lieu of granting a post verdict judgment of acquittal, may modify the verdict and render a judgment of conviction of the lesser included responsive offense.

Added by Acts 1982, No. 144, Section 1.

STATEMENT OF THE CASE

Petitioner's Statement of the Case generally reflects the facts in a limited manner, and with self-serving declarations, all of which gives support to the argument of respondent. For instance, counsel observed "Ms. Bates did not appreciate the significance of this closet incident until early November, 1987,"(page 5). There was absolutely nothing significant about the alleged closet incident of October 6, 1987, but some six weeks later, after discussing the case with others, attempts were made to attach significance to the alleged incident.

Another example is counsel's reference to a physical examination conducted by Dr. B. F. Thompson on November 9, 1987, and counsel observes "The exam was inconclusive." (page 5).

A *Brady* motion was filed on behalf of respondent and petitioner did not disclose the physical examination by the family pediatrician or the results of the examination. Through other sources, it was discovered that a physical examination had been conducted and respondent subpoenaed the records of Dr. B. F. Thompson which reflected no evidence of abuse.

In order to protect respondent, in the event a writ would issue, counsel has attached to the Appendix, commencing at page 33a, a detailed Statement of the Case with supporting testimony.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO FEDERAL QUESTION PRESENTED BY THE PETITION.

The State of Louisiana has suggested that this Court should grant the petition based on an alleged improper interpretation and application of *Jackson v. Virginia*, 433 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) by the Supreme Court of Louisiana in the case of *State v. Mussall*, 523 So. 2d 1305 (La. 1988). Petitioner argues that the Supreme Court of Louisiana, in *Mussall*, went beyond and broadened the minimum due process requirements enunciated in *Jackson*, and based upon this alleged expanded interpretation, the Court of Appeal, First Circuit, reversed the jury verdict in the instant case. Petitioner's statutory authority is United States Constitution, Amendment XIV, Section 1 and Louisiana Constitution, Article V, Section 5 (1974), which limits the appellate jurisdiction of the Supreme Court of Louisiana, in criminal matters, to questions of law. As indicated previously, reliance on this section of the Louisiana Constitution of 1974 is improper and the appropriate provision is Louisiana Constitution, Article V, Section 10 (1974), which is a matter of no moment inasmuch as the question of sufficiency of evidence is a question of law and permits factual review. *State v. Moran, supra.*

Succinctly stated, petitioner complains that the Court of Appeal, First Circuit, reversed the conviction influenced by the decision of the Supreme Court of Louisiana in *State v. Mussall, supra*; that the Supreme Court of Louisiana, in *Mussall*, expanded the minimum due process requirements of *Jackson v. Virginia, supra*, and allegedly reviewed the facts which is prohibited by the Louisiana Constitution.

Conceding, *arguendo*, the premise advanced by petitioner, there is no violation of any provision of the United States Constitution, Amendment XIV, Section 1. The Court of Appeal, First Circuit, afforded a review on the sufficiency of the evidence in keeping with the minimum due process requirements of *Jackson v. Virginia*, and by affording that review, it matters not, from a federal standpoint, whether the State of Louisiana afforded broader or greater protection.

Furthermore, petitioner overlooks the bare, but real, facts. The State of Louisiana, by enacting Act. No. 144 of 1982 has codified the holding in *Jackson v. Virginia*, and, as set forth above, this due process principle now appears in Article 821, Louisiana Code of Criminal Procedure. This was recognized by the Supreme Court of Louisiana in *State v. Smith*, 441 So. 2d 739, 741, wherein the court observed:

> [1] In order to satisfy due process standards, the record evidence, viewed in the light most favorable to the prosecution, must be sufficient for a rational juror to conclude that the essential elements of the crime were proved beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). La. C. Cr. P. Art. 821, added by Act No. 144 of 1982, tracks the *Jackson* language in setting up a Louisiana standard pertaining to post-verdict motions for acquittal based upon insufficiency of the evidence.

Article 821 regulates the testing of the sufficiency of the evidence at the trial and appellate court levels. Consequently, petitioner is confined to addressing any complaint about Article 821 to either the Supreme Court of Louisiana or the Louisiana Legislature.

We fail to find, even by inference, a federal question presented by petitioner. It has long been the requirement that a federal question be set forth in order to invoke the jurisdiction of this Court as stated in the early decision of *Oxley Stave Co. v. Butler County*, 17 S. Ct. 709, 711, 166 U.S. 648, 655 (1897):

> Upon like grounds the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intending to assert a federal right.

II.

THE STATE OF LOUISIANA FAILED TO COMPLY WITH SUPREME COURT RULE 14(1)(h).

Supreme Court Rule 14(1)(h) provides:

> (h) If review of a judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were raised; the method or manner of raising them and the way in which they were passed upon by those courts; and such pertinent quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of court's charge and exception thereto, assignment

> of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari. When the portions of the record relied upon under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph .1(k) of this Rule.

A reading of the petition fails to reflect that petitioner has complied or attempted to comply with the clear and specific mandate of this rule and the answer is simple. No federal question was presented to the Court of Appeal, First Circuit, or the Supreme Court of Louisiana.

III.

PETITIONER DID NOT PROPERLY RAISE A FEDERAL QUESTION, IF A QUESTION DID EXIST.

It is axiomatic that for purposes of certiorari under 28 U.S.C. § 1257 that the validity of a federal treaty or statute must have been "drawn in question" or a federal title, right privilege, or immunity must have been "specially set up or claimed." One legal scholar has stated, "You must raise the federal question at the outset and not as an afterthought after you have lost below."[4]

Once the federal question has developed, it is necessary that it be raised at some point in the state court proceeding. This principle was stated in *Amalgamated Food Employees Union v. Logan Valley Plaza*, 88 S. Ct. 1601, 1616, 391 U.S. 308, 334 (dissent) thusly:

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4. Wiener, *Wanna Make a Federal Case Out of It?*, 48 A.B.A.J. 59, 60 (1962).

> The rule that in cases coming from state courts this court may review only those issues which were presented to the state court is not discretionary but jurisdictional.

This principle is stated succinctly but differently in *Monks v. New Jersey*, 90 S. Ct. 1563, 398 U.S. 71 (1970):

> The further claim advanced by petitioner's appointed counsel in this Court respecting the alleged unconstitutional application of N. J. State Ann. Section 2A:4-37(b) has been raised for the first time upon this writ and the State Courts have had no opportunity to pass upon it.

This rule was further discussed in *Cardinale v. Louisiana*, 89 S. Ct. 1161, 1162, 1163, 394 U.S. 437, 438 (1969) including sound reasons for its existence.

Reference to petitioner's petition for a writ of certiorari, and the brief in support thereof, submitted to the Supreme Court of Louisiana, fails to reflect any mention of any unconstitutional action and particularly in *State v. Mussall, supra.*

Petitioner requests:

> Thus, the state urges this court to *reexamine the evidence* presented at trial using the correct standard of review and giving the state's evidence the deference to which it is legally entitled.

(Emphasis supplied).

In the same petition, petitioner specified the "ISSUE OF LAW PRESENTED" as:

> Whether the evidence presented at trial was sufficient to convince a rational trier of fact of defendant's guilt of each element necessary to prove the crime of molestation of a juvenile.

Petitioner listed five (5) Specifications of Error and in discussing *State v. Mussall, supra,* petitioner concludes:

> Mussall stood for the proposition that an actual factfinder's discretion [should] be impinged upon only the extent necessary to guarantee the fundamental protection of due process of law. Mussall, 523 So. 2d at 1310.

Counsel argued forcefully that the Court of Appeal applied the improper standard of review. The Supreme Court of Louisiana unanimously denied a writ and petitioner filed a motion for reconsideration, again urging the court to examine the facts.

Nowhere, either in the original petition or the motion for reconsideration, was any mention made of anything unconstitutional and particularly in violation of United States Constitution, Amendment XIV, Section 1. In fact, the State never expressed any dissatisfaction with *Mussall.*

CONCLUSION

This petition is totally without merit and frivolous. Petitioner is requesting that this Court review a state court case and render judgment to the effect that the Court of Appeal, First Circuit, with the approval of the Supreme Court of Louisiana, failed to apply the proper standard of review in a criminal case, not because the court failed to follow the minimum due process standards of *Jackson v. Virginia*, but, as counsel insists, the court broadened or expanded the standard of review. The Supreme Court of Louisiana unanimously concluded that the Court of Appeal, First Circuit, did follow the appropriate standard of review and that review was in keeping with *Jackson v. Virginia*. If the review afforded more than the minimum due process, the complaint addresses itself to the State of Louisiana, and not this Honorable Court.

Respectfully submitted,

ROBERT L. KLEINPETER
KLEINPETER & KLEINPETER
Attorneys for Respondent

APPENDIX A — ORDER OF THE SUPREME COURT OF THE STATE OF LOUISIANA DATED JUNE 28, 1991

THE SUPREME COURT OF THE STATE OF LOUISIANA

No. 91-K-0781

STATE OF LOUISIANA

VS.

BRIAN BRUCE

In Re: State of Louisiana applying for Reconsideration of Writ denied May 24, 1991 from the Court of Appeal, First Circuit No. KA90 0562; Parish of East Baton Rouge 19th Judicial District Court Div. "C" Number 9-88-984

June 28, 1991

Reconsideration denied.

WFM

PFC

JLD

JCW

HTL

LFC

PH

Appendix A

Supreme Court of Louisiana
June 28, 1991

s/ [illegible]
Clerk of Court
For the Court

APPENDIX B — ORDER OF THE SUPREME COURT OF THE STATE OF LOUISIANA DATED MAY 24, 1991

THE SUPREME COURT OF THE STATE OF LOUISIANA

No. 91-K-0781

STATE OF LOUISIANA

VS.

BRIAN BRUCE

In Re: State of Louisiana; - Plaintiff(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, First Circuit, Number KA90 0562; Parish of East Baton Rouge 19th Judicial District Court Div. "C" Number 9-88-984

May 24, 1991

Writ denied.

JCW

PFC

WFM

JLD

HTL

LFC

PH

Appendix B

Supreme Court of Louisiana
May 24, 1991

s/ [illegible]
Deputy Clerk of Court
For the Court

APPENDIX C — APPELLEE'S APPLICATION FOR WRIT OF REVIEW TO THE SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA

LOUISIANA SUPREME COURT

NO.

STATE OF LOUISIANA
APPELLEE

VERSUS

BRIAN BRUCE
APPELLANT

ON WRITS FROM THE FIRST CIRCUIT
COURT OF APPEAL
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

APPLICATION FOR WRIT OF REVIEW ON BEHALF OF THE STATE OF LOUISIANA

DOUG MOREAU
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Appendix C

SUPREME COURT
NO. _____

STATE OF LOUISIANA

VERSUS

BRIAN BRUCE

ON WRITS FROM THE FIRST CIRCUIT COURT OF APPEAL
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

STATEMENT OF JURISDICTION

This is an application by the State of Louisiana for writ of certiorari to review the decision of the First Circuit Court of Appeal which reversed a molestation of a juvenile conviction. This court has jurisdiction over the present matter by virtue of article V, sections 2 and 5 of the Louisiana Constitution which grant supervisory jurisdiction to this court over the courts of appeal.

STATEMENT OF THE CASE

On March 5, 1991, the First Circuit Court of Appeal reversed defendant's conviction for molestation of a juvenile. Defendant was originally charged with, and tried by jury for, the molestation of two young boys, then ages four and six, whom he taught at the Baton Rouge Speech and Hearing Foundation.

Despite the state's production of overwhelming circumstantial evidence the jury returned a verdict of not guilty relative to Count

II (the molestation of the six year old, Andrew Moak). Apparently, the jury was unconvinced of defendant's guilt as to this count since it was without benefit of the direct testimony of the then eight year old hearing and speech impaired victim whom the court had ruled incompetent to testify. However, with the benefit of the direct testimony of the then six year and eight month old victim, Christopher Wilkerson, whom the court properly found competent, directly implicating defendant, and the overwhelming circumstantial evidence and expert testimony establishing defendant's guilt, the jury returned a verdict of guilty as charged to Count I. The trial court sentenced defendant to imprisonment at hard labor for fifteen years, suspended, and placed him on five years' supervised probation subject to special conditions.

On appeal, the First Circuit found merit to defendant's assigned error that the evidence was insufficient to support the conviction and, accordingly, reversed.

The state respectfully asserts that the First Circuit committed manifest error in reversing this conviction. Since the appellate court erroneously applied the circumstantial evidence standard of review to the combined circumstantial and direct evidence presented in support of Count I, the result which it reached cannot be considered trustworthy or legally proper. The standard of review enunciated in *Jackson v. Virginia,* 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) and incorporated in La. Code Crim. P. art. 821, properly controls cases in which both direct and circumstantial evidence are involved. Moreover, it is clear from a reading of the First Circuit's opinion that the evidence was not examined in the light most favorable to the prosecution, as *Jackson* requires, but was rather viewed in the light most favorable to the defendant. The court repeatedly resolved weaknesses in the state's case-in-chief in favor of the defendant and inconsistencies

among state and defense witnesses in favor of defense witnesses. The court gave negative testimony greater weight than it gave to positive testimony, in direct contravention of the mandate of La. R.S. 15:440. The court omitted state's evidence, damaging to defendant, entirely from its review. Finally, the court consistently second-guessed the credibility evaluations which the jury made of the witnesses it saw testify, despite the fact that the law is clear concerning the deference to be given the trier of fact's credibility determinations. *State v. Collins*, 328 So.2d 674 (La. 1976); *State v. Robinson*, 525 So.2d 708 (La. App. 1st Cir. 1988), *writ denied*, 532 So.2d 712 (La. 1988).

Thus, the state urges this court to reexamine the evidence presented at trial using the correct standard of review and giving the state's evidence the deference to which it is legally entitled. So viewed, the record evidence calls for this Honorable Court to reverse the First Circuit's opinion and to reinstate the jury's verdict.

STATEMENT OF THE FACTS

The state's evidence at trial established the following facts. In the spring of 1987, Christopher Wilkerson's parents began sending him to the Baton Rouge Speech and Hearing foundation where he was given individual speech therapy, once a week, for a speech impediment. The child then attended a special summer school program at the Foundation and was subsequently enrolled in the 1987 fall semester of daily instruction at the Foundation beginning in September. During the fall semester, every morning until noon, the child attended a class taught by Charlotte Sartain Provensa, while the defendant, Brian Bruce, or "B.B.", as he was commonly called, taught another class in a classroom across the hall. Each day at 12:30, after lunch, the child went to the

defendant's classroom where the defendant supervised him and several other preschool and kindergarten children who stayed at school in the afternoon until 2:00 or 2:15 p.m. Because the child's mother worked, the child's maternal grandmother transported him to and from school on a regular basis.

Christopher Wilkerson was a happy child who loved school, had a particular fondness for "B.B.", and was very close to his father and grandfather. (R. pp. 71-72, 137, 158.) In the fall of 1987, his behavior began to change. (R. pp. 158-9.) Christopher quit talking about school, was reluctant to get dressed in the morning, and even began hiding his schoolwork in his grandmother's car. (R. p. 72.) Significantly, Christopher quit talking about "B.B." although he had previously talked about him all the time. (R. pp. 71, 97, 137.) He withdrew from his father and grandfather. (R. pp. 137, 158-59.) Although he had been potty trained since age one and a half, Chris began soiling his pants. (R. pp. 138, 159.) On one occasion, he grabbed his older brother's penis as the two bathed together and tried to put it in his mouth. (R. pp. 97-98.) His parents noticed that his rectum was, unexplainably, red and irritated. (R. p. 140.)

On October 6, 1987, Christopher's grandmother arrived five to ten minutes late in picking up Christopher from school. (R. pp. 154, 157.) She looked in "B.B.'s" classroom, where Chris usually was, but found no one. She solicited the aid of a teacher's assistant, Marguerite Baronne, and the two walked through the school calling for Christopher within earshot of the closet where he was ultimately found, for approximately ten minutes. (R. pp. 158, 172, 297-98, 387.) Finally, the two women returned to "B.B.'s" classroom where they observed "B.B." and Chris emerge from a closed walk-in closet.[1] Christopher's grandmother, Jerry

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1. The dimensions of this closet measured eight feet by ten feet. (R. p. 129.)

Bates, grabbed the child and left. (R. pp. 157, 165-67, 172, 387.)

Ms. Bates did not appreciate the significance of this closet incident until early November, 1987. On that date, she and her daughter, Debra Wilkerson, discussed Christopher's behavioral changes and began to put two and two together. (R. p. 159.) They related their concerns to the police. (R. p. 159.)

At the police officer's suggestion, Christopher's parents took Chris to see a medical doctor. On November 9, 1987, Dr. B.F. Thompson conducted a physical examination of the child. The exam was inconclusive. (R. p. 144.) Later that evening, Joseph Wilkerson, Christopher's father, discussed the matter with Christopher. Based on what Christopher told him had occurred with "B.B.", Mr. Wilkerson signed an affidavit in support of a warrant for defendant's arrest. (R. p. 140.)

Christopher was taken to see Dr. Alan Taylor, a clinical psychologist capable of rendering an opinion regarding sexual abuse of children. Dr. Taylor conducted interviews on several occasions with Christopher and also interviewed his family and concluded that in his expert opinion, Christopher Wilkerson had been sexually abused. (R. pp. 190, 203-05.) He further explained that from the information he received from Chris concerning the type of abuse involved, there would be no physical evidence. (R. p. 220.)

At trial, Christopher, then aged six years and eight months (R. p. 69), stated for the record that he did not like Mr. B.B. because he had done something that made Christopher not like the teacher. He stated that "B.B." had touched him in the "wrong place." When asked where the "wrong place" was, Christopher touched his genitals. (R. pp. 106-07.) He further stated that the

touching took place in the closet near his classroom at school. (R. p. 107.)

After Christopher's parents pulled him out of the Baton Rouge Speech and Hearing Foundation and placed him in a new school, Christopher began returning to the child he had previously been. He began sitting on his father's lap again. (R. pp. 140-41.) He liked school again. (R. p. 161.) However, when Dr. Taylor consulted Chris approximately one year after the abuse, the child still exhibited extreme anger towards defendant. (R. pp. 201-03.)

ISSUE OF LAW PRESENTED

Whether the evidence presented at trial was sufficient to convince a rational trier of fact of defendant's guilt of each element necessary to prove the crime of molestation of a juvenile.

SPECIFICATIONS OF ERROR

(1) That the First Circuit erred in reviewing the sufficiency of the evidence upon which defendant was convicted by applying the wrong standard of review.

(2) That the First Circuit erred in failing to view the evidence in the light most favorable to the prosecution.

(3) That the First Circuit erred in omitting State's evidence from its review of the sufficiency of the evidence as a whole.

(4) That the First Circuit erred by invading the province of the jury in that it arbitrarily second-guessed the jury's credibility evaluations of witnesses.

(5) The First Circuit erred when it essentially ruled the child's

witness' testimony incredible despite the trial court's determination that the child was competent and the First Circuit's determination that an objection to that ruling had been waived by defendant's failure to contemporaneously object.

ARGUMENT

In evaluating the evidence, the jury correctly found defendant, Brian Bruce, guilty as charged of the crime of molestation of a juvenile. In reversing this decision on the grounds that no rational factfinder could have found the evidence sufficient to support the verdict, the court of appeal erred in several respects.

In reviewing the evidence presented to prove the requisite elements of the charged offense the First Circuit conceded that the state established through "direct evidence: (1) that the defendant was forty-one years old; (2) that the child was four years old (it was actually established that the child was approximately four years and nine months old at the time of the offense (R. p. 69)); and (3) that the defendant had a position of control or supervision over the child." (Opinion p. 14.)

In order to establish a violation of La. R.S. 14:81.2, the state was additionally required to prove that the defendant had committed a lewd or lascivious act upon the victim with the intention of arousing or gratifying his sexual desires. The court of appeal found that no rational factfinder could have found that the state bore its burden of proving these elements beyond a reasonable doubt. The court held:

> the remaining evidence boils down to the October 6, 1987 closet incident and the child's testimony at trial. With regard to the closet incident, we find

> the *hypothesis of innocence* presented by the defendant *sufficiently reasonable* that any rational trier of fact would have a reasonable doubt as to defendant's guilt .. Therefore, the prosecution's case hinges on the testimony of the child. *Simply because the child's testimony tends to support each fact necessary to constitute the crime charged*, we may not disregard our duty under due process of law as interpreted by *Jackson v. Virginia*. *State v. Mussall*, 523 So.2d at 1311.

(*Emphasis added; footnote omitted.*) The court then reviewed the child's testimony in a light blatantly favorable to the defendant, focusing on the child's young age and prior reluctance to openly offer details of the crime[2] and ultimately concluded that "the decision of the jury to convict this defendant based on the evidence presented [was] irrational and unsupported."

This holding is replete with errors. First, the incorrect standard of review was applied to the evidence. As the court of appeal correctly stated, the "child's testimony support[ed] . . . each fact necessary to constitute the crime charged. . . ." This child's

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2. At this point it should be noted that the defendant designated as error the trial court's finding this child witness competent to testify. Due to the defendant's failure to contemporaneously object to this ruling, the court of appeal concluded this error was meritless. However, a review of the language in this portion of the appellate court's opinion leaves no doubt that the court was attacking the competency of this witness. Although the alleged error was not properly before the court of appeal for consideration, the State should stress that the trial court did properly rule the child competent. *State v. Fox*, 439 So.2d 433 (La. 1983); *State v. Wilkund*, 546 So.2d 250 (La. App. 1st Cir. 1989); *State v. Armstrong*, 453 So.2d 1256 (La. App. 3d Cir. 1984).

testimony constituted direct evidence of defendant's guilt and alone, was sufficient to prove the elements of the offense. *State v. Johnson*, 529 So.2d 466 (La. App. 1st Cir. 1988), *writ denied*, 536 So.2d 1233 (La. 1988). Thus, the court of appeal erred in placing the burden of excluding the "reasonable" explanations of innocence advanced by defendant on the state. The circumstantial evidence rule of La. R.S. 15:438 requires this burden only when circumstantial evidence alone is advanced in support of a conviction. Even then, La. R.S. 15:438 does not establish a stricter standard of review than the more general reasonable juror's reasonable doubt formula, but only emphasizes the need for careful observance of the usual standard, providing a helpful methodology for its implementation in cases which hinge on the evaluation of circumstantial evidence. *State v. Chism*, 436 So.2d 464 (La. 1983); *State v. Smith*, 441 So.2d 739 (La. 1983).

Since each element of this crime was established in whole or in part by direct evidence, then the correct standard to be applied by the appellate court reviewing the sufficiency of the evidence is that pronounced in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L. Ed. 2d 560 (1979). The *Jackson* standard is applicable in cases involving both direct and circumstantial evidence. An appellate court reviewing the sufficiency of evidence in such cases must resolve any conflict in the direct evidence by viewing that evidence in the light most favorable to the prosecution. When the direct evidence is thus viewed, the facts established by the direct evidence and inferred from the circumstances established by that evidence must be sufficient for a rational trier of fact to conclude beyond a reasonable doubt that defendant was guilty of every essential element of the crime. *State v. Captville*, 448 So.2d 676 (La. 1984); *State v. Sutton*, 436 So.2d 471 (La. 1983). This standard of review, in particular the requirement that the evidence be viewed in the light most favorable to the prosecution,

obliges the reviewing court to defer to "the actual trier of fact's rational credibility calls, evidence weighing, and inference drawing." *State v. Mussall*, 523 So.2d 1305 at 1311 (La. 1988). Thus, the reviewing court is not permitted "to decide whether *it* believes the witnesses or whether the conviction is contrary to the weight of the evidence." *Id. See also State v. Rosiere*, 488 So.2d 965 (La. 1986); *State v. Burge*, 515 So.2d 495 (La. App. 1st Cir. 1987).

The First Circuit's determination that *State v. Mussall*, 523 So.2d 1305 (La. 1988) required reversal of the jury's verdict in this case is wholly incorrect. As this Honorable Court explained in *State v. Augustine*, 555 So.2d 1331 (La. 1990),

> *Mussall* was an unusual case that nonetheless applied the *Jackson v. Virginia* standard . . . There we held that the victim's story was so incredible, even reviewed in the light most favorable to the prosecution, that the decision to convict was not rational, and that no rational juror could have found all the elements of the crime beyond a reasonable doubt.

This court went on to conclude that the facts of *Augustine* were not analogous to those of *Mussall* and ultimately concluded that "[a] rational juror could indeed have found the defendant guilty beyond a reasonable doubt." *State v. Augustine*, 555 So.2d at 133. In *Mussall*, this court greatly labored to provide explanation for its reversal of the jury's verdict. The extensive citation of case law and thorough factual review engaged in by this court in that opinion, evidence the value which the Louisiana Supreme Court places on a properly returned jury verdict. *Mussall* stood for the proposition that an "actual factfinder's discretion [should] be impinged upon only to the extent necessary to guarantee the

fundamental protection of due process of law." *Mussall*, 523 So.2d at 1310. Only when the verdict is *irrational* should it be reversed. *Id.*

The verdict returned in this case clearly cannot be considered irrational. The state established, through the testimony of Christopher's mother, father, and grandmother, the marked behavioral changes which Christopher underwent during the fall of 1987 and the connection those changes had with school.

Dr. Allen Taylor testified concerning his professional interpretation of those changes based upon interviews and tests which he performed with Christopher and his family. In evaluating Dr. Taylor's testimony and his use of anatomically correct dolls in his sessions with Chris, the First Circuit said that Taylor

> testified that the use of the dolls is highly controversial, however he utilizes them when working with developmentally handicapped children. He used them in this case based on the child's unwillingness to communicate and in light of the child's speech and language delay.

(Opinion, p.4) From this recantation of the testimony, it is reasonably inferred that the First Circuit questioned the validity of the use of dolls in interviewing sex abuse victims. Later in its opinion, the court pointed out that William Owen Scott and his wife, Mary Lou Kelly, clinical psychologists who performed a joint evaluation of Dr. Taylor's report and who testified as defense witnesses had problems with Taylor's report. The court stated:

> [P]rimarily, they objected to his reliance on the use of anatomically correct dolls in reaching his

conclusion that the child had been abused.

(Opinion p. 10.)

In actuality, all three doctors were in complete agreement concerning the proper use of dolls in interviewing children. (R. pp. 187, 309, 332, 362.) Dr. Taylor testified that the dolls were not properly used to determine *if* a child had been abused, but rather as a tool to assist a child in communicating details of the abuse. He went on to state that, in analyzing Christopher, he used the dolls for their intended purpose. (R. p. 187.) On cross examination, Dr. Taylor specifically refuted defense counsel's suggestion that he held the belief that use of dolls constituted a test to determine if sexual abuse had occurred. (R. p. 205.)

When Dr. Scott testified he stated that he had several problems with Dr. Taylor's report. First, he stated he was concerned that the child had never verbalized regarding the abuse directly to Dr. Taylor. (R. p. 310.) However, better than that, the child verbalized on the witness stand that the abuse had occurred. (R. p. 106.) Second, Dr. Scott stated that the child's behavior changes were "vague." (R. p. 310.) This statement was clearly contradicted by the positive direct evidence of the state's witnesses. Third, Dr. Kleinpeter stated that the parents may have suggested the abuse to the child, that they "wanted to hear it." (R. p. 311.) This allegation was addressed and specifically refuted by Dr. Taylor who testified that parents don't want to hear that their child has been abused; that Christopher's behavior could not be explained by having watched his parents' sexual behavior; that Christopher's behavior did not indicate that he had been coached; and finally, that had Chris been coached he would not have concomitantly manifested the behavioral changes which he did in fact display. (R. pp. 214-220.) Fourth, Dr. Scott attacked

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Dr. Taylor's use of the anatomically correct dolls, stating that the dolls should not be used as a "test" but rather as a tool to assist a child in verbalizing the details of the abuse. (R. p. 311.) Since Dr. Taylor's actual use of the dolls was entirely consistent with Dr. Scott's testimony concerning the dolls' proper use, this concern is unsupported. (R. p. 332.) Finally, Dr. Scott was concerned that the doll play in which Christopher engaged during his second set of sessions with Dr. Taylor differed from that which he engaged in during his first. (R. p. 313.) Dr. Taylor testified in his expert opinion concerning his interpretation of this deviation. (R. p. 203.)

The jury obviously found the testimony of Dr. Taylor, who had visited with Christopher on at least seven occasions, more credible than the testimony of Dr. Scott, who had never met Christopher and who had met defendant only once for one hour after being hired by defense counsel to examine defendant to determine if he was a probable child molester.[3] (R. p. 319, 323, 325, 330.) As the First Circuit so aptly put, on the same day which

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3. Even after meeting defendant, Dr. Scott could reach no definitive conclusion as to whether defendant was a child molester. (R. p. 331.) He testified that defendant's performance on an objective psychological test showed an unusual defensive attitude characteristic of people who are distrustful and suspicious, who view the world as hostile, feel mistreated, tend to be nonconformist and alienated, and view others negatively because of that alienation. (R. p. 329.) Dr. Scott stated that individuals with the test score which defendant received view other people as motivated by exploiting one another. (R. p. 328.)

Dr. Scott's testimony also established that because of defendant's strong defensive tendency, the test results may have underestimated defendant's actual level of psychopathy under stress. (R. p. 330.) Finally, Dr. Scott recognized that defendant would likely withhold "information that would reflect on the likelihood that he had sexually abused anyone." (R. p. 323.)

it rendered this opinion:

> This Court will not assess the credibility of witnesses or reweigh the evidence to overturn a factfinder's determination of guilt. *State v. Polkey*, 529 So.2d 474, 476 (La. App. 1st Cir. 1988), *writ denied*, 536 So.2d 1233 (La. 1989). The testimony of the victim alone is sufficient to prove the elements of the offense. Furthermore, the trier of fact may accept in whole or in part, the testimony of any witness. Moreover, when there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. *State v. Johnson*, 529 So.2d at 473.

State v. Carlwynn Turner, No. KA/90/0098 (La. App. 1st Cir., Mar. 5, 1989).

That the appellate court ignored their own recitation of the law as applicable to this case is evidenced by the mere formatting of its opinion. The First Circuit transcribed in the body of its opinion the relevant portion of the victim's testimony, then immediately following that pointed out that defendant denied the allegations against him and transcribed defendant's explanation of the October 6th closet incident. The appellate court then reviewed the testimony of each of the defense witnesses who explained the open-door policy which existed at the school, Christopher's alleged known propensity for hiding in the closet, and defendant's good character. In evaluating this evidence, the First Circuit said: The defendant's explanation regarding the incident was supported by the testimony of numerous witnesses and

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> [t]here is no evidence in the record to contradict defendant's explanation that he first went to the exits leading outside to look for the child before he checked the closet; in fact, the child's grandmother admitted that it was possible that the defendant was looking for the child at the same time that she was.

(Opinion p. 15.) Not only does this statement demonstrate that the appellate court failed to give the state's evidence and the jury's findings the proper weight which they are due, this statement is entirely incorrect.

The state established, through the testimony of Ms. Bates, that defendant was inside the closet with Chris with the door *closed.* (R. p. 172.) Resolution of any conflict perceived between that testimony and the testimony of Ms. Baronne that from what she remembered, the door was closed, properly belonged to the jury. Defendant neither admitted or denied whether the door was shut; however, in light of his explanation of the incident, it is difficult to imagine an innocent reason for having the door closed.

The state established, through the testimony of Ms. Bates, that she and Ms. Baronne searched for Chris for approximately ten minutes before finding him, and that she called for the child. (R. pp. 158, 172.) Ms. Provensa stated that calling could be heard from inside the closet. (R. pp. 297-98.)

The state admitted into evidence a layout of the physical setup of the schoolroom; it impeached defendant's testimony that he failed to look for the child in the closet immediately because he throught Chris may have run out of the classroom. This diagram was viewed by the jury and showed that if defendant had been

standing across the hall as he said he was he would have seen the child run out. (R. pp. 430, 446.) Moreover, depite the overwhelming consistency of the defense witnesses' testimony concerning Chris' well-known propensity to hide in *that particular closet*, defendant, Chris' own teacher, testified that he did not immediately look in the closet because he was unaware of this fact. (R. pp. 430, 446.)

Of special significance is the inconsistency between defendant's version of what occurred after he and the child exited the closet and that testified to by Ms. Bates and Ms. Baronne. Defendant's testimony that he punished Christopher by insisting, over Ms. Bates' objection, that Chris take a "time-out" (R. p. 432) was discredited by the testimony of *both* Ms. Bates and Ms. Baronne that Ms. Bates picked up the child and left immediately. (R. pp. 157, 165, 389.)

> Under the circumstances, the juror's conclusion that defendant was not testifying truthfully could reasonably support an inference that the "truth" — if told by him as the only other" person in the closet with the victim — "would have been favorable to his . . defense."

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4. Other contradictions include the fact that defendant claims he was outside the classroom looking for the child; however, no one else saw defendant looking for Chris (*see, e.g.*, tr. p. 322; R. p. 387); defendant stated that the day after the closet incident he discussed it with another teacher, Charlotte Provensa (tr. p. 375; R. p. 440), whereas Ms. Provensa testified that she did not remember discussing the closet incident with the defendant until after he was arrested and certainly not the day after it happened. (Tr. p. 232; R. p. 297.) The defendant's explanation of Chris' behavior on October 6 was inconsistent with the other teacher's testimony concerning Chris' typical behavior in playing this hiding "game."

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State v. Captville, 448 So.2d at 680. As the Supreme Court noted in *Captville*,

> Such a finding of purposeful misrepresentation reasonably raises the inference of a "guilty mind," just as in the case of "flight" following an offense or the case of a material misrepresentation of facts by a defendant following an offense. *See State v. Davenport*, 445 So.2d 1190 (La. 1984).
>
> "Lying" has been recognized as indicative of an awarenes of wrongdoing. See *State v. Rault*, 445 So.2d 1203 (La. 1984), in which this court, in rejecting as unreasonable an asserted "hypothesis of innocence" (based on defendant's own statement), stated:
>
> > 'The jury could have reasonably concluded that Rault concocted this version of the crime to hide his own guilt.' 445 So.2d at 1213.
>
> Any contrary implications in *State v. Savoy*, 418 So.2d 547 (La. 1982), and *State v. Shapiro*, 431 So.2d 372 (La. 1983), simply mean that such evidence, although admissible to support a "guilty mind," are not alone sufficient to confict.

The jury could have reasonably concluded that defendant's explanation as to Chris' hiding and his subsequent disciplining of the child was a belated fabrication to account for his being in the closet with Chris. The jury in the present case obviously chose to reject the defendant's testimony in favor of that of the child and of his grandmother. *See State v. Murphy*, 515 So.2d

558 (La. App. 1st Cir. 1987); *State v. Cox*, 450 So.2d 1073 (La. App. 1st Cir. 1984).

In *State v. Guirlando*, 491 So.2d 38 (La. App. 1st 1986), the First Circuit relied on this Honorable Court's pronouncement of the law in *State v. Captville*, 448 So.2d at 680, in reaching its conclusion that the trial court correctly found sufficient evidence to prove beyond a reasonable doubt, the defendant's guilt, though the evidence was wholly circumstantial. Quoting *Captville*, the First Circuit said:

> When a case involves circumstantial evidence, and the jury reasonably rejects the hypothesis of innocence presented by the defendant's own testimony, that hypothesis fails, and the defendant is guilty unless there is another hypothesis which raises a reasonable doubt. An evaluation of the reasonableness of other hypotheses of innocence provides a helpful methodology for determining the existence of a reasonable doubt. As we have recognized in such cases as *State v. Wright*, 445 So.2d 1198 (La. 1984), *State v. Graham*, 422 So.2d 123 (La. 1982), and *State v. Sutton*, 436 So.2d 71 (La. 1983), this court does *not* determine whether another *possible* hypothesis has been suggested by defendant which *could* explain the events in an inculpatory fashion. Rather, the reviewing court evaluates the evidence in the light most favorable to the prosecution and determines whether the alternative hypothesis is sufficiently reasonable that a rational juror could not "have found proof of guilt beyond a reasonable doubt. *Jackson v. Virginia, above.*

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Christopher Wilkerson testified that defendant touched him in the "wrong place" and that the touching occurred in the closet. The record refutes the First Circuit's incorrect statement that Chris merely "gestured" to his genitals in explaining what the "wrong place" was, by reflecting that the victim *touched* his genitals in explaining where defendant touched him. This testimony "alone is sufficient to prove the elements of the offense." *State v. Polkey*, 529 So.2d 474 (La. App. 1st Cir. 1988), *writ denied*, 536 So.2d 1233 (La. 1989); *State v. Johnson*, 529 So.2d 466 (La. App. 1st Cir. 1988), *writ denied*, 536 So.2d 1233 (La. 1989).

The record evidence shows that had the appellate court viewed the whole of the evidence in a light favorable to the prosecution, left credibility determinations to the body empowered by law to make them, and applied the proper standard of review to the evidence before it, the First Circuit would have upheld the jury's verdict. That this jury was a rational body, not on a manhunt for a perpetrator of a perceived crime, is evidenced by the fact that it acquitted defendant on the charge of molesting Andrew Moak, despite significant evidence indicating defendant's guilt of that count. Supporting the conclusion that the trial court was not making rubber stamp competency evaluations in adjudicating Christopher Wilkerson competent to testify as a witness, is the court's prior determination that Andrew Moak was incompetent.

Moreover, the state takes issue with the court's attack on its perceived weaknesses in this case which, in fact, are by nature present in every sexual abuse case. The victim's reluctance to openly discuss the details of the attack is a frequently encountered hurdle. The fact that this particular victim had speech difficulties should not deny him the protections we afford our normal speeched children. That this defendant escaped punishment on one count simply because he chose a hearing and speech impaired

child as his victim is tragedy enough. Finally, the state takes particular issue with the First Circuit's suggestion that the Assistant District Attorney coached this witness. While it is true that members of the district attorney's office met with the child in private, this practice is in fact common procedure, and is designed to protect the integrity of the child's statements by preventing possible parental influence.

The record evidence in this case sufficiently proved the defendant's guilt. The jury heard the witnesses' testimony and properly found the state's witnesses more credible than the defendant's self-serving testimony. The Court of Appeal overstepped its legal bounds in second-guessing those determinations. The guilty verdict was both rational and well supported.

CONCLUSION

For the foregoing reasons, the state strongly urges this Honorable Court to apply the proper standard in reviewing the evidence presented at trial, and to examine that evidence in the light it is entitled by law to be viewed. In light of the arguments presented in brief, the jury's conviction and trial court's sentence should be reinstated.

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VERIFICATION

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned authority, personally appeared

GWENDOLYN K. BROWN

who being sworn, stated:

I certify that all of the allegations contained in the foregoing application for supervisory writs are true and correct to the best of affiant's information and belief. I further certify that a copy of the foregoing has been mailed, postage prepaid, to the First Circuit Court of Appeals, Baton Rouge, Louisiana, and to Robert L. Kleinpeter, Attorney for Defendant, P.O. Box 66443, Baton Rouge, Louisiana 70896.

s/ Gwendolyn K. Brown
GWENDOLYN K. BROWN
ASSISTANT DISTRICT
ATTORNEY

s/ E. Sue Bernie
E. SUE BERNIE
ASSISTANT DISTRICT
ATTORNEY

SWORN TO AND SUBSCRIBED BEFORE ME, this 7th

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day of April, 1991, at Baton Rouge, Louisiana.

s/ [illegible]
NOTARY PUBLIC

APPENDIX D — APPELLEE'S MOTION FOR RECONSIDERATION OF WRIT OF REVIEW

SUPREME COURT
STATE OF LOUISIANA

STATE OF LOUISIANA
APPELLEE

VERSUS

BRIAN BRUCE
APPELLANT

DOCKET NO. 91-K-0781

MOTION FOR RECONSIDERATION OF WRIT OF REVIEW ON BEHALF OF THE STATE OF LOUISIANA

NOW INTO COURT, through the undersigned Assistant District Attorney, comes the State of Louisiana, respectfully moving this Honorable Court to reconsider the writ application filed on behalf of the State.

MAY IT PLEASE THE COURT:

Based upon the direct and corroborated testimony of the six-year eight-month old victim, the defendant Brian Bruce was convicted by a six person jury of molestation of a juvenile. The First Circuit Court of Appeal, applying the incorrect legal standard of review (the circumstantial evidence test), viewing the evidence in the light most favorable to the defendant, and misrepresenting the facts as set forth in the record, usurped the function of the jury by reversing defendant's conviction on the ground that no

rational factfinder could have convicted defendant since he offered a plausible explanation for one of the incriminating instances which the State adduced evidence upon. The State of Louisiana implores this Court to review the record, and using the correct legal standards, to reinstate the jury verdict which was rationally reached at the trial level. To do otherwise is to give a stamp of approval to the First Circuit's opinion which in effect (1) decrees that the testimony of a child is inferior to that of an adult and unworthy of belief (even if corroborated), and (2) gives appellate courts license to disregard the credibility choices made by jurors who heard the testimony and substitute their own opinions, based upon a cold record (and in this case one skewed by the court), of the guilt or innocence of a defendant.

The State recognizes the appellate court's authority pursuant to *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L. Ed. 2d 560 (1979) to reverse a conviction if there is insufficient evidence that a rational juror could have found the essential elements of the crime beyond a reasonable doubt. A fair reading of the record clearly demonstrates that the First Circuit opinion, contrary to the mandate of *Jackson v. Virginia*, not only viewed the evidence in the light most favorable to the defendant but also omitted testimony that was harmful to the defendant.[1] Even more

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1. Of special significance is the inconsistency between the defendant's version of what occurred after he and the child exited the closet and that testified to by Ms. Bates, the victim's grandmother, and Ms. Baronne, a teacher's aide called by the defense. Defendant's testimony that he punished Christopher by insisting, over Ms. Bates' objection, that Chris take a "timeout" (R. p. 432) was discredited by the testimony of *both* Ms. Bates and Ms. Baronne that Ms. Bates picked up the child and left immediately. (R. pp. 157, 165, 389.) The jury could have reasonably concluded that defendant's explanation as to Chris' hiding and his subsequent disciplining of the child was a belated fabrication

(Cont'd)

disturbing is the First Circuit's blatant distortion of the facts of this case as evidenced by the trial transcript. All that the State requests is an honest review of the record and a application of the law. An example of the appellate court's distortion of the facts appears in footnote 3, where it is stated: "The record also contains the testimony of three clinical psychologists, however, as discussed earlier, their testimony was wholly inconclusive as to whether sexual abuse had in fact occurred." Even a cursory review of the record reveals that the State's expert, Dr. Alan Taylor, rendered his expert opinion that *the victim had been sexually abused.* (R. pp. 190, 203-05.)[2] Another example of a misstatement of the record is the court's conclusion that "the only incriminating testimony elicited from the child at trial was that the defendant touched the child in the 'wrong place,' which the child designated, by *gesturing* (emphasis added) to his genitals." A correct reading of the record shows that the child touched his genitals in demonstrating what the defendant did to him (R pp. 106-07.) If this Honorable Court allows the First

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(Cont'd)
to account for his being in the closet with Chris. Other contradictions include the fact that defendant claims he was outside the classroom looking for the child; (however, no one else saw defendant looking for Chris (*see, e.g.*, tr. p. 322; R. p. 387); defendant stated that the day after the closet incident he discussed it with another teacher, Charlotte Provensa (tr. p. 375; R. p. 440), whereas Ms. Provensa testified that she did not remember discussing the closet incident with the defendant until after he was arrested and certainly not the day after it happened. (Tr. p. 232; R. p. 297.) The defendant's explanation of Chris' behavior on October 6 was inconsistent with the other teacher's testimony concerning Chris' typical behavior in playing this hiding "game."

2. Does it even make sense that the State would call an expert to testify that in his opinion it is inconclusive that the child was sexually abused? This defies common sense, and a review of the record clearly refutes the statement made in the First Circuit's opinion.

Circuit's opinion to stand, it provides tacit approval of the appellate court's declaration that "*the circumstantial evidence* (emphasis added) of the closet incident presented by the prosecution fails to exclude the reasonable explanation that the child was hiding and that the defendant found him in the closet and brought him into the classroom," when in fact there was *direct* evidence by the child that what occurred in the closet was an inappropriate sexual touching. In reviewing this case, the appellate court misstated the facts, and then, having incorrectly characterized the evidence as circumstantial, applied the wrong standard of review. That the appellate court's opinion flies in the face of established law is patent on the record.

What is at issue here is not only the integrity of rationally reached, sound jury verdicts but also the protection of children who are sexually abused. If the testimony of sexually abused children is discounted whenever challenged by "plausible" contradictory accounts presented by those accused of the abuse, we will never again convict a child molester. The defendant in this case was afforded the full protection of all of his rights at trial. He explained the one incident where adults witnessed him engaging in suspicious behavior with the victim by stating that the child ran into the closet and he (defendant) was merely retrieving the child. Defendant never did explain why he closed the door behind him, why he failed to answer the child's grandmother's calls for the child as she searched the school for him, or offer any hypotheses relative to the child's accusations or his sudden hatred of school and the defendant in particular. After hearing the state' s evidence against the accused, including defendant's intellectually unsatisfying testimony, the jury rationally chose not to believe him and instead believed the corroborated testimony of the victim and other witnesses. The defendant was legally and properly convicted of molestation of a juvenile. This

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Court has the power and the duty to uphold the validity of the jury's verdict, to reject the First Circuit's misrepresentation of the record and misapplication of the law. The State respectfully asks that it be afforded a fair review and that justice be done.

RESPECTFULLY SUBMITTED

DOUG MOREAU
DISTRICT ATTORNEY

By: s/ E. Sue Bernie
E. Sue Bernie
Assistant District Attorney
Nineteenth Judicial District Court
Parish of East Baton Rouge
State of Louisiana
222 St. Louis Street, 5th Floor
Baton Rouge, Louisiana 70801
Telephone: (504) 389-3445

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been mailed, postage prepaid, to Robert L. Kleinpeter, Attorney for Defendant, P.O. Box 66443, Baton Rouge, Louisiana, 70896.

Baton Rouge, Louisiana, this 7th day of June, 1991.

s/ E. Sue Bernie
E. Sue Bernie
Assistant District Attorney

APPENDIX E—APPELLANT'S STATEMENT OF THE CASE

STATEMENT OF THE CASE

Brian Bruce commenced working at the Baton Rouge Speech & Hearing Foundation as a volunteer, later became a teacher's aide, and then became a teacher when he earned his master's degree from L. S.U. He was the Director of the Summer Program for the Baton Rouge Speech & Foundation (R-421), having been employed for thirteen years as of the date of this arrest.

The semesters at the Baton Rouge Speech & Hearing Foundation ran concurrently with the semesters for the Parish Schools. A school day for Brian Bruce during September, October, November, 1987, would start with classes at 9:00 a.m., with a group of four-year-olds. He worked with them until 12:00 noon, at which time these students went home. There was a lunch break and at 12:30 p.m Brian Bruce took over the kindergarten class. He remained with them, probably outside on the playground or maybe on the inside, until 2:15 p.m., at which time these children left and his day ended (R-422).

All parents were expected to be prompt in bringing and picking up the children, and the school sent notices to parents who were not prompt in picking up their children (R-423).

Brian Bruce was familiar with Christopher Wilkinson, having seen him in the summer session of 1987, but did not have any contact. However, he had Christopher in the afternoon class during the fall semester of 1987 (R-422).

The building occupied by the Baton Rouge Speech & Hearing Foundation was in the shape of an "H," with a hall and administrative offices on the right leg and a hall and work areas on the left leg. The two "legs" were connected by halls with two

classrooms on each side. The classroom where Brian Bruce taught consisted of a blackboard and a door with windows on one wall, which was open at all times with no lock and a window that opened to a hallway. Off this hallway was a closet and bath which was shared between the two (2) classrooms on that side of the building. The back wall was a picture window that opened to the outside, and the remaining wall was a one-way mirror where people could observe from the outside without being seen (R-422).

Recess was taken in a fenced-in backyard. In the afternoon he had the kindergarten children and he taught them games with a couple of L.S.U. students (R-425).

According to Brian Bruce, Christopher Wilkinson was fairly intelligent, with a few speech difficulties, was brought to school by his grandmother and the grandmother was punctual about picking him up in the afternoons (R-427).

Significantly, it was established that Christopher Wilkinson encountered no problem, such as soiling or messing his clothes, as supposedly occurred at home, at the Baton Rouge Speech & Hearing Foundation (R-428).

In addition to the regular classes in the morning and the kindergarten class, at the Baton Rouge Speech & Hearing Foundation, there was a day care for children whose parents worked and could not come at 2:15 p.m.

On October 6, 1987, Brian Bruce took two of the children that he was teaching in the afternoon in the kindergarten class to the day care room inasmuch as the parents would not be coming for them. When he returned to his room, Christopher Wilkinson was gone and his grandmother was not there. Being concerned,

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Brian Bruce immediately commenced looking for Christopher (R-430). Apparently, the grandmother was running late (R-154), and upon reporting to the room (R-156), Christopher was not there. One of the teachers, Ms. Margaret Baronne, with the grandmother, located Christopher as he was being led from a closet by Brian Bruce. Nothing appeared out of the ordinary; Christopher was fully clothed and was not harmed in any way, and she took Christopher and left (R-157, 158). The grandmother testified that everyone knew that she would be at the school between 2:00 and 2:30. Although the grandmother did not see Brian Bruce when she arrived at the school, she nevertheless admitted that he could have been looking for Christopher at the same time (R-164).

The appearance and condition of Christopher was verified by the testimony of Ms. Margaret Baronne (R-380). She established that the doors at the Baton Rouge Speech & Hearing Foundation were always opened, and she specifically recalled on October 6, 1987, that the grandmother came for Christopher. The grandmother contacted Ms. Baronne and she walked to Christopher' s room, and they found Christopher and Brian Bruce and there was nothing to alarm anyone or anything to be suspicious about; Mrs. Bates simply took Christopher and left (R-382).

Brian Bruce was arrested on November 13, 1987, on a warrant signed by Joseph and Deborah Wilkinson, charging Brian Bruce with violating LSA-R.S. 14:81.2 (Molestation of a Juvenile) and LSA-R.S. 14:41.3 (Sexual Battery). An indictment was returned on September 27, 1988, by the Grand Jury for the Parish of East Baton Rouge, Louisiana, charging Brian Bruce with Molestation of a Juvenile in violation of LSA-R.S. 14:81.2.

The affidavit executed by the parents on November 13, 1987,

alleged that Brian Bruce exposed himself (genitals) to their minor son, Christopher Wilkinson, white male, age four (4), and forced the child to touch his genitals; and that Brian Bruce violated LSA-R.S. 14:43.1 in that he committed a battery by placing the middle finger of each hand up the rectum of Christopher Wilkerson (sic.) (R-17, 18).

The indictment returned on September 27, 1988, (R-19) alleged that between October 1, 1987, and December 1, 1987, Brian Bruce committed the offense of Molestation of a Juvenile in violation of LSA-R.S. 14:81.2.

A Motion for a Bill of Particulars (R-20) was filed, requesting the location where the alleged lewd and lascivious acts took place as well as requesting specific facts as to how and what manner the alleged lewd and lascivious acts occurred, and, finally, requesting information as to how the alleged acts would arouse and gratify the sexual desires of the Defendant (R-211). An Answer was filed to the Request for a Bill of Particulars (R-30). The State set forth that the acts in a room adjacent to the Defendant's classroom at the Baton Rouge Speech & Hearing Foundation (535 West Roosevelt), but that the exact dates were unknown, "having been committed during the day while C. Wilkinson was on the school premises." With reference to the lewd and lascivious acts, the answer to these consisted of fondling of C. Wilkinson's genitals and rectal area, the Defendant rubbing his penis on the victim's penis and of the Defendant attempting to place his penis between the victim's buttocks. Further, they set forth that the Defendant also tried to get C. Wilkinson to touch Defendant's penis. In answer to Request Number Three (3), as to how this would satisfy or arouse Brian Bruce sexually, the State responded "Not Entitled."

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The Wilkinson family, Deborah Wilkinson and Joseph Wilkinson, testified that they had three sons, ages thirteen, ten and six, respectively, as of the date of the trial. Christopher Wilkinson was born on January 31, 1983, and had a speech difficulty. During the calendar year 1987, they contacted the Baton Rouge Speech & Hearing Foundation with Christopher being enrolled as a student during the summer and then returned for the regular session in September, 1987. During the summer, he went to school, according to Deborah Wilkinson, between 8:30 a.m. and 2:30 p.m. (R-70).

The grandmother, Mrs. Bates, took Christopher to school. He had one teacher in the morning; in the afternoon he had Brian Bruce. Chris liked Brian Bruce and called him "Mister BB" (R-71).

During the first part of October, 1987, Mrs. Wilkinson was out of town for two (2) weeks, and Christopher stayed with his grandmother, who supposedly noticed that Christopher was not bringing papers home or was hiding them and did not want to talk about school, and she had difficulty in getting him up in the morning. Additionally, Christopher started pulling away from his father (R-72). Additional testimony reflected that Christopher Wilkinson allegedly starting soiling his pants (R-73). On one occasion, according to the mother, when Christopher Wilkinson and the older son, Dewayne, were bathing, Christopher allegedly attempted to put his mouth on the penis of Dewayne (R-73). At this time the mother and the grandmother talked about the situation and later spoke with a policeman. They removed Christopher from school, and thereafter, Christopher supposedly commenced talking with his father, slowly quit soiling his clothes and began liking school (R-74), but then Christopher would not talk to his mother (R-76).

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On November 9, 1987, Christopher Wilkinson was taken to see Dr. B. F. Thomas, the family pediatrician. While the mother went with Christopher and his father, she did not go into the doctor's office (R-78). The husband, Joseph Wilkinson, admitted that he took Christopher to see Dr. B. F. Thomas (R-144) and that Dr. Thomas did not find anything to reflect any abuse (R-144). At that visit Joseph Wilkinson was present when Dr. Thomas inserted the anal scope and found nothing wrong. With reference to Christopher soiling his clothes, the father stated that Christopher was not taken to the doctor for that reason (R-146).

According to the mother, the District Attorney recommended that they see a psychologist by the name of Dr. Allen Taylor and that they took Christopher for interviews (R-84). In connection with these interviews, the mother stated that she did not sit in on the conference (R-85). When questioned as to why Christopher Wilkinson would soil his clothes or why his rectum was red, the mother responded that she did not know (R-90).

Dr. Allen Taylor first saw Christopher Wilkinson on February 1, 1988, (R-182). Dr. Taylor related that he was familiar with the use of anatomically correct or anatomically specific dolls which are used in sexual abuse cases as an aid in terms of working with children who may be unable to express clearly accounts of what happened. With reference to the use of anatomically correct dolls and whether children who have been sexually abused react to those dolls differently than those who have not, the psychologist responded, "Unfortunately, a lot of the research is recent — it's only been in the last few years that there's a good bit of material coming out from researchers. So it's still in beginning stages."

With reference to the sessions with Christopher, the psychologist stated, after his final session, that Christopher had

indicated all he was going to or was willing to or was able to and that Christopher was reluctant to participate, to talk, and would go off and get involved in some other activity or would turn his head or would curl up. When specifically interrogated about the alleged incident, the psychologist stated that Christopher vigorously shook his head and during the entire first set of sessions would not give many verbal responses at all (R-199).

This first set of sessions was concluded in March, 1988, toward the middle of March, after which he provided a report to the family, after which, Dr. Taylor related that he did not hear from the family again until the following fall, some four or five months later (R-200).

He then saw Christopher again and found that he was able to communicate somewhat better, both verbally and nonverbally, although he still continued to show some reluctance to talk (R-201). In response to an inquiry from the District Attorney, with reference to whether an abuse had occurred, Dr. Taylor responded that as a clinical practitioner his opinion would be that he had been abused (R-205).

On cross-examination, Dr. Allen Taylor was questioned extensively about the anatomical, like-like dolls, as to whether it was an accepted practice to use in the field of psychology, to which he responded, "That is a matter of controversy," and, "There is no test that can determine when a child has been abused or whether or not an individual has abused anyone" (R-206).

With reference to the continuous multiple interviews, Dr. Taylor was interrogated as to whether he agreed that in some instances, if not most instances, continuous multiple interviews with a child, particularly one who has difficulty communicating,

can result in a confused child or prompt him to react, based upon misinformation, in a way that the interviewer wants to hear him, to which he replied, "That's always a possibility." Additionally, Dr. Taylor was interrogated about his written report of April 19, 1988, in which he reported in the initial interviews that Christopher Wilkinson "never wanted to say anything," but that in spite of that he had interviews on February 1, 1988, February 3, 1988, February 17, 1988, February 23, 1988, March 9, 1988, and March 17, 1988 (R208).

Significantly, Dr. Taylor admitted that after seeing Christopher Wilkinson on six occasions, he "concluded that, considering Christopher's overall capacity and emotional wear and tear on him occasioned by the original event and subsequent evaluation, it seems very unlikely that he would be or could be cooperative with further prodding in attempts to get more information from him" (R-209). He also concluded, with reference to further prodding, that he felt at that time that Christopher had "given all the information he was capable of giving, considering his limitations with speech and expression, and that he emotionally wished to put this behind him" (R-210).

Between the first interview sessions with Dr. Taylor and the later interviews with a four or five month interval, Christopher Wilkinson was taken to the District Attorney' s Office on four or five occasions. His mother stated that she didn't know what they talked about because "she would take him into a room," and when interrogated as to whether anyone would be present, the mother responded, "No, sir." After the interviews with Dr. Allen Taylor and the visits to the District Attorney's Office, Christopher was able to respond to specific questions. He was interrogated by the Assistant District Attorney as to whether he liked "BB," to which he responded, "No, Ma'am." Secondly,

he was asked, "Did he do something?" "Yes." "Did he touch you?" to which the answer was, "Yes." Then the District Attorney inquired as to, "Where?" to which he responded, "In the wrong place" (R-106). The District Attorney, Sue Bernie, (R-107) stated that she would like for the record to reflect that the witness touched his genitals. The District Attorney then interrogated Christopher Wilkinson as to whether "BB" made him do anything to him, to which he responded, "No." This was followed by a question, "Did he try?" to which Christopher Wilkinson responded, "No," and finally, "Did BB ever hurt you?" to which he responded, "No."

It was established by the Principal, Ms. Glynda Barnes, that during the period involved she the Director of the Baton Rouge Speech & Hearing Foundation, and that Brian Bruce had been there for a number of years. She indicated further, that Brian Bruce always had more than one pupil in his class, and that it was it the policy of the school to encourage parents to visit the school but that she had never met Mr. and Mrs. Wilkinson, but did meet the grandmother on one occasion (R-116).

Charlotte Sartin Provensa established that she was an elementary teacher at the Baton Rouge Speech & Hearing Foundation (R-282), and besides verifying other important facts, testified that Christopher Wilkinson had behavior and speech problems and that Christopher, as well as two other children, like to hide, particularly in a closet which was in between the classrooms and that this happened quite frequently (R-287). Charlotte Sartin Provensa also established that in addition to the teacher being present during the day, there was an aide, speech therapist, and sometimes as many as ten adults not including the principal and other school employees.

Appendix E

In addition to the testimony of several teachers and other witnesses who established the open-door policy at the Baton Rouge Speech & Hearing Foundation and the good character of Brian Bruce, the testimony of two psychologists was offered, Dr. William Owen Scott, qualified in the field of Child, Adolescent and Adult Psychology, with a Ph. D. in Clinical Psychology from the University of Virginia; and Dr. Mary Lou Kelly, an Associate Professor with tenure at Louisiana State University, who engages in the private practice of psychology, and part of her teaching responsibilities at Louisiana State University was the supervision of clinical training of all Ph. D. candidates for the Program in Child Clinical Care on the faculty of the Earl K. Long Hospital Medical Center (R-208, 351).

These witnesses both testified that there are valid uses for anatomically correct dolls, but not in the area of determining whether sexual abuse has taken place (R-309). Both evaluated the written reports of Dr. Allen Taylor, and Dr. Scott found five areas of fault (R-310) with his report. He stated, first, that the child, Christopher Wilkinson, did not verify verbally that abuse had taken place, although he had the opportunity to do so on numerous occasions which was very important. Secondly, Dr. Scott indicated that behavioral changes could mean that abuse had occurred but was not conclusive and that changes should be specific (R-310), and, thirdly, that Dr. Allen Taylor did not consider any other alternative possibilities for any of the things reported; that too much time elapsed between the first sessions and the second sessions of interviews, and that a lot of bias could take place in that time (R-311). Fourth, Dr. Scott stated that the anatomically correct doll is not a correct procedure to utilize in this instance. It was opinion that you do not use the doll to determine if abuse has taken place, but that the doll should be used after abuse has taken place to determine if it actually occurred (R-311). Finally,

his last finding was that the second series of evaluations was approximately one year after the first series, that the anatomically correct dolls were utilized again, and that the child enacted a very dramatic kind of confrontation which was quite different from what had occurred during the first series of interviews and that the child's play with the dolls was not consistent (R-312). It was the opinion of Dr. William Owen Scott, based upon reports of Dr. Allen Taylor, that, "I could not come to any conclusion based on those reports." It was his feeling that he could not tell whether the child was abused or not abused, that there was some behavior consistent with abuse and there were certain things consistent with not having been abused.

Dr. Mary Lou Kelly testified with reference to the anatomically correct dolls that they are not used as tools in research but that it is only after said, "I have been abused," then the dolls are used to show concretely how they were abused. With reference to the reports of Dr. Allen Taylor, she testified that they were very troublesome in that they were highly inferential (R-353). She concluded, as did Dr. William Owen Scott, that, based on the reports of Dr. Allen Taylor, she would not conclude that child abuse had occurred (R-356).

Brian Bruce emphatically denied ever abusing Christopher Wilkinson, and the Court of Appeal, First Circuit, concluded that the circumstantial evidence of the closet incident presented by the prosecution failed to exclude the very reasonable explanation and that the child was hiding and that the Defendant found him in the closet and brought him out into the classroom. The testimony of Margaret Baronne as well as the testimony of the grandmother, Mrs. Bates, was to the effect that they did not notice anything unusual or alarming when the child and Brian Bruce exited the closet, the child was fully clothed, was not crying, and

did not act unusual.

In this connection, the Court of Appeal, First Circuit, did not mention the fact that the child was examined by the family pediatrician, Dr. B. F. Thomas, on November 9, 1987, and that no evidence of abuse was found.

Accordingly, the Court of Appeal, First Circuit, appropriately and properly applied *Jackson vs. Virginia*, 433 U.S. 307, 99 S.Ct. 2781, 61 L. Ed.2d 560 (1979) and Article 821 of the Louisiana Code of Criminal Procedure.